United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

ORIGINAL

76-7348

To be argued by
SAUL Z. COHEN

B

United States Court of Appeals

For the Second Circuit

BOSTON M. CHANCE LOUIS C. MERCADO, *et al.*,
Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS,
Defendant-Appellant,

P/S

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and the CHANCELLOR OF THE CITY SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
OCT 6 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF OF DEFENDANT-APPELLANT BOARD OF EXAMINERS

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant-Appellant
Board of Examiners
425 Park Avenue
New York, New York 10022
(212) 759-8400

Of Counsel:
SAUL Z. COHEN
JULIUS BERMAN
HOWARD A. JACOBSON
BARRY P. SCHWARTZ

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Issues Presented for Review	2
Statement of the Case	6
Plaintiffs' Preliminary Injunction Motion	6
The 1973 Consent Judgment	8
The Permanent Plan for Plenary Examinations	10
The March 25, 1975 Order	11
Defendant Board of Education Failed to Carry Out Its Responsibilities Under the Permanent Plan	13
The Motions to "Modify", and to Implement, the Consent Judgment and the March 25, 1975 Order	15
Argument	
I—The Consent Judgment Herein Should Be Vacated and This Case Dismissed in Its Entirety Because of the United States Supreme Court's Decision in *Washington* v. *Davis*	16
A. *Washington* v. *Davis* effectively reversed the preliminary injunction decisions in this case	18
1. The decision in *Washington* v. *Davis*	18
2. The impact of *Washington* v. *Davis*	21
B. In view of *Washington* v. *Davis*, the Consent Judgment herein should be vacated	24
1. The Consent Judgment was based upon the erroneous preliminary injunction decisions	24

PAGE

2. The Examiners' consent to the July 1973 Judgment does not bar relief from that Judgment 25

3. The Consent Judgment should be vacated 27

C. This case should be dismissed in its entirety 27

II—In Any Event the Judgment Appealed From Should Be Reversed Since It Was Error to Grant the Motion to "Modify," and Deny the Motion to Implement, the Consent Judgment and the March 25, 1975 Order 33

A. The motion to "modify" was erroneously granted 33

1. The district court lacked the power to grant the so-called "modification" motion 36

a. The Judgment below cannot be justified as a "modification" of prior consent decrees since, without a trial or evidentiary hearing, it imposed substantial restraints upon the Examiners going well beyond those agreed to in the prior decrees 37

b. The movants did not and could not satisfy the stringent requirements for any modification of a consent decree 40

(i) The prototype job analyses 43

(ii) The City's current financial situation 44

(iii) The personnel requirements in the City's schools 47

PAGE

c. Under the circumstances, the district court should have restricted any judicial relief to that which would have preserved the parties' agreement in the Consent Judgment 48

d. The "modification" involved a prohibited rethinking of the situation which existed when the original decree was entered 51

e. The district court lacked the power to enter the Judgment in the absence of a trial on the merits or a full evidentiary hearing 53

f. The district court's stated reasons for granting the "modification" were legally insufficient 56

2. The "modification" vitiates New York State's constitutional and statutory scheme for selection and licensing of supervisory personnel in the New York City schools 58

a. The Judgment entered below contravenes New York's constitutional and statutory scheme in numerous ways 60

b. The Judgment runs afoul of important considerations of federalism 69

3. The "modification" eliminates the universally accepted requirement that a job analysis be prepared as a prerequisite to valid employment testing procedures 70

PAGE

4. The effect of the "modification" is to undermine the utility of consent dispositions of protracted litigations and the notion of finality 73

5. The Board of Education should have been barred from obtaining the "modification" by its inconsistent position in this case in 1973 and 1974 77

6. The Board of Education and Chancellor should have been barred from obtaining the "modification" by their failure and refusal to carry out in good faith their obligations under the Permanent Plan 80

B. The motion to implement was erroneously denied 81

Conclusion 84

Addenda

Addendum A—New York's Constitutional and Statutory Scheme for the Selection and Licensing of Supervisory Personnel in the New York Schools A1

Addendum B—In the Matter of the Investigation of the Board of Examiners of the City of New York by the President of the Board of Education (N.Y.S. Education Department, January 23, 1926) B1

TABLE OF AUTHORITIES

PAGE

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 71
Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283 (2nd Cir. 1962) 75

Board of Education v. Nyquist, 31 N.Y.2d 468, 341 N.Y.S.2d 441 (1973) ..... 58, 59n., 60, 64, 67, 68, 81n.
Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm., 482 F.2d 1333 (2nd Cir. 1972) 72
Brown v. Board of Education, 386 F. Supp. 110 (N.D. Ill. 1974) ..... 30n.
Burns v. Alcala, 420 U.S. 575 (1975) ..... 26n.
Butler v. Denton, 57 F. Supp. 656 (E.D. Okla. 1944), *aff'd*, 150 F.2d 687 (10th Cir. 1945) 38

Caprio v. Wilson, 513 F.2d 837 (9th Cir. 1975) 30
Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940) ..... 17n.
Carpenters' District Council v. Cicci, 261 F.2d 5 (6th Cir. 1958) ..... 55n.
Carter v. Jury Comm'n, 396 U.S. 320 (1970) ..... 69n.
Chrysler Corp. v. United States, 316 U.S. 556 (1942) 57n.

Delson v. Minogue, 190 F. Supp. 935 (E.D.N.Y. 1961) 77n.
Dickerson v. Colgrove, 100 U.S. 578 (1879) ..... 77n.
Dopp v. Franklin National Bank, 461 F.2d 873 (2nd Cir. 1972) ..... 55n.
Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) 79, 80

Elgin National Watch Co. v. Barrett, 213 F.2d 776 (5th Cir. 1954) ..... 27n.

PAGE

Fink v. Finegan, 270 N.Y. 356, 1 N.E.2d 462 (1936) 68
Flaks v. Koegel, 504 F.2d 702 (2nd Cir. 1974) ..... 55n.
Ford Motor Co. v. United States, 335 U.S. 303 (1948) 37, 38, 57n.

Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971) 82
George W. Myers Co., In re, 412 F.2d 785 (3rd Cir. 1969) 55
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ....18 & n., 19, 21, 22, 23
Gulf Oil Corp. v. Simon, 502 F.2d 1154 (Temp. Emergency Ct. App. 1974) 31, 32

Hawkins v. Board of Control, 253 F.2d 752 (5th Cir. 1958) ..... 55n.
Hughes v. United States, 342 U.S. 353 (1952) 49, 54

International Alliance v. Rex Theatre Corp., 73 F.2d 92 (7th Cir. 1934) 81
Investigation of the Board of Examiners of the City of New York by the President of the Board of Education, In re (N.Y.S. Education Department, January 23, 1926) 62, 63, 64, B1-B9

Johnson, In re, 518 F.2d 246 (10th Cir.), *cert. denied,* 423 U.S. 823 (1975) 79
Jones v. New York City Human Resources Administration, 391 F. Supp. 1064 (S.D.N.Y. 1975), *aff'd,* 528 F.2d 696 (2nd Cir. 1976), *petition for cert. filed,* 44 U.S.L.W. 3686 (U.S. May 22, 1976) (No. 75-1694) 72
Jones v. Schellenberger, 225 F.2d 784 (7th Cir. 1955), *cert. denied,* 350 U.S. 989 (1956) ..... 17n.

PAGE

Jurisdiction of the Board of Examiners of the City School District of New York, In re, 25 State Department Reports 275 (Education Department, February 9, 1921) 61, 62, 64, 67

Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2nd Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3678 (U.S. May 7, 1976) (No. 75-1631) 72

Lignos v. United States, 439 F.2d 1365 (2nd Cir. 1971) 77n.

Mayor v. Educational Equality League, 415 U.S. 605 (1974) ..... 69n.
McComb v. Crane, 174 F.2d 646 (5th Cir. 1949) ..... 17n.
Morgan v. United States, 304 U.S. 1 (1938) 55
Morrissey v. Brewer, 408 U.S. 471 (1972) 55

National Life Ins. Co. v. Solomon, 529 F.2d 59 (2nd Cir. 1975) (*per curiam*) ..... 55n.

Palmer v. Board of Education, 276 N.Y. 222, 11 N.E. 2d 887 (1937) ..... 59n.
Patterson v. Newspaper & Mail Delivery Union, 514 F.2d 767 (2nd Cir. 1975), *cert. denied*, 44 U.S. L.W. 3756 (U.S. June 30, 1976) ..... 40n.
Perrone v. Pennsylvania R.R. Co., 143 F.2d 168 (2nd Cir. 1944) ..... 17n.
Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806 (1945) 80

Rizzo v. Goode, —— U.S. ——, 46 L. Ed.2d 561 (1976) 69, 70
Robert Stigwood Group, Ltd. v. Hurwitz, 462 F.2d 910 (2nd Cir. 1972) 30

PAGE

Robinson v. E.P. Dutton & Co., 45 F.R.D. 360 (S.D. N.Y. 1968) ..... 76 & n.
Rode & Brand v. Kamm Games, 181 F.2d 584 (2nd Cir. 1950) ..... 77n.

SEC v. Frank, 388 F.2d 486 (2nd Cir. 1968) ..... 55n.
SEC v. Jan-Dal Oil & Gas, Inc., 433 F.2d 304 (10th Cir. 1970) 42, 46
SEC v. LeBrock, 245 F. Supp. 799 (S.D.N.Y. 1965) 42
SEC v. Thermodynamics, Inc., 319 F. Supp. 1380 (D. Colo. 1970), *aff'd*, 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973) ..... 42, 46 & n., 53n.
Siegel v. National Periodical Publications, Inc., 508 F.2d 909 (2nd Cir. 1974) ..... 53n.
Sims v. Greene, 161 F.2d 87 (3rd Cir. 1947) ..... 55n.
Steingruber v. Johnson, 35 F. Supp. 662 (M.D. Tenn. 1940) 38, 39
System Federation v. Wright, 364 U.S. 642 (1961) ..... 25, 26, 27, 57n.

Texas Co. v. Gulf Refining Co., 26 F.2d 394 (5th Cir.), *cert. denied*, 278 U.S. 625 (1928) 79
Theriault v. Smith, 519 F.2d 809 (1st Cir. 1975) 26
Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975) 25, 27

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 44 U.S. L.W. 3593 (U.S. Apr. 19, 1976) ..... 40n.
United States v. Armour & Co., 402 U.S. 673 (1971) 49, 50, 53, 54, 75
United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 49, 53, 54
United States v. Beatrice Foods Co., 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975) 49

PAGE

United States v. Chambers, 291 U.S. 217 (1934) ..... 17n.
United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) 77n., 80, 81
United States v. Lucky Lager Brewing Co., 209 F. Supp. 665 (D. Utah 1962) 42, 51, 52, 76
United States v. Owens-Corning Fiberglas Corp., 178 F. Supp. 325 (N.D. Ohio 1959) 42
United States v. Savannah Cotton & Naval Stores Exchange, Inc., 192 F. Supp. 256 (S.D. Ga. 1960), *aff'd sub nom.* Turpentine & Rosin Factors, Inc. v. United States, 365 U.S. 298 (1961) (*per curiam*) 39, 42
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) ..... 17n.
United States v. Shubert, 163 F. Supp. 123 (S.D.N.Y. 1958) ..... 39, 42, 46, 76 & n.
United States v. Swift & Co., 286 U.S. 106 (1932) 40, 41, 42, 45, 46, 51, 57n.
United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (*per curiam*) 42 & n., 51, 52, 54, 76
United States v. W.T. Grant Co., 345 U.S. 629 (1953) 30

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) ..... 17n.
Vulcan Society v. Civil Service Comm., 490 F.2d 387 (2nd Cir. 1973) 72

Wagner v. Warnasch, 156 Tex. 334, 295 S.W.2d 890 (1956) 82
Wallace Clark & Co. v. Acheson Industries, Inc., 532 F.2d 846 (2nd Cir. 1976) ..... 53n.
Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), *rev'g*, 512 F.2d 956 (D.C. Cir. 1975), *rev'g*, 348 F. Supp. 15 (D.D.C. 1972) ..... 2, 16, 17 & n., 18, 19, 20 & n., 21, 22, 23, 24, 27, 28, 31 & n., 32

PAGE

Washington Free Community v. Wilson, 334 F. Supp. 77 (D.D.C. 1971), *aff'd*, 484 F.2d 1078 (D.C. Cir. 1973) ..... 30n.
Weyenberg v. Menasha, 401 F. Supp. 801 (E.D. Wis. 1975) 55
Wirtz v. Graham Transfer & Storage Co., 322 F.2d 650 (5th Cir. 1963) ..... 42n.

Zdanok v. Glidden Co., 327 F.2d 944 (2nd Cir.), *cert. denied*, 377 U.S. 934 (1964) ..... 61n.
Ziffrin, Inc. v. United States, 318 U.S. 73 (1943) ..... 17n.

Statutes:

U.S. Const. amends. V and XIV ..... 3, 5, 6, 7, 17, 19, 21, 23 & n., 27, 29, 31, 49, 50, 54, 55
Civil Rights Act of 1870 ch. 114, §16, 42 U.S.C. §1981 (1974) 29
Civil Rights Act of 1871 ch. 22, §1, 42 U.S.C. §1983 (1974) 29
Civil Rights Act of 1964 Title VII, §701 *et seq., as amended*, 42 U.S.C. §2000e *et seq.* (1974) ..... 3, 18 & n., 19, 21, 23 & n., 29 & n., 31
N.Y. Const. art. 5, §6 ..... 5, 44, 58 & n., 59 & n., 68, 78, A1
N.Y. Educ. Law 5, 44, 58n., 61, 64, 66, 67n., 78, 81, A1, A2
N.Y. Educ. Law §2569(1)(a) (McKinney Supp. Oct. 1975) 58, 61, A1
N.Y. Educ. Law §2573(2) (McKinney 1970) 58, A2
N.Y. Educ. Law §2590-j(2) (McKinney 1970) 35n., 66, A2
N.Y. Educ. Law §2590-j(3)(a)(1) (McKinney Supp. Oct. 1975) ..... 58, 61 & n., 68, 78, A1
N.Y. Educ. Law §2590-j(3)(b)(2) (McKinney Supp. Oct. 1975) 58, A2
N.Y. Educ. Law §2590-j(3)(b)(3) (McKinney Supp. Oct. 1975) 58, A2

PAGE

Rules and Regulations:

Fed. R. Civ. P. 37 ..... 55n.
Fed. R. Civ. P. 70 83
Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures," 29 C.F.R. Part 1607 (1975) 43, 71, 73
Equal Employment Opportunity Coordinating Council's proposed "Uniform Guidelines on Employee Selection Procedures," 41 Fed. Reg. 29016, 29019-29020 (1976) 73

Other Authorities:

1B J. Moore's Federal Practice §0.409[5], at 1032 (2d ed. 1974) ..... 53n.

United States Court of Appeals

For the Second Circuit

Docket No. 76-7348

BOSTON M. CHANCE, LOUIS C. MERCADO, *et al.*,
Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS,
Defendant-Appellant,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and the CHANCELLOR OF THE CITY SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF OF DEFENDANT-APPELLANT BOARD OF EXAMINERS

Preliminary Statement

The Board of Examiners appeals from a judgment of the United States District Court for the Southern District of New York (Pollack, J.) entered on July 7, 1976 (the

"Judgment") without a trial, over the opposition of the Board of Examiners, and without any showing that such relief was necessary to protect any federally recognized right or achieve any federal goal. That Judgment, among other things, imposed far-reaching restraints upon the Board of Examiners' ability to carry out its statutory responsibility to "prepare and administer" examinations for the selection and licensing of supervisory personnel in the New York City school system. These restraints were imposed in the guise of making minor "modifications" in a permanent plan for a comprehensive system of new plenary supervisory examinations (the "Permanent Plan") which had been developed and agreed to by all parties in accordance with the Final Judgment on Consent entered July 12, 1973 (Mansfield, J.) and which had been approved by the district court (Tyler, J.) by order entered March 25, 1975. In fact, the Judgment appealed from did not "modify" the Permanent Plan; rather it vacated the Permanent Plan in its entirety and substituted in its place a revised plan for licensing (the "Revised Plan") which had been prepared by defendants Board of Education and Chancellor after discussions with plaintiffs, but without the participation of the Board of Examiners and over its objection.

Issues Presented for Review

1. Should the Judgment appealed from be vacated and this case be dismissed in its entirety because of the intervening decision of the United States Supreme Court in *Washington* v. *Davis*, [illegible] S.L.W. 4789 (U.S. June 7, 1976), which held that in order to make out an employment dis-

crimination case brought under the United States Constitution but not under Title VII of the Civil Rights Act of 1964, it is necessary to prove that defendants had "a racially discriminatory purpose" and that proof that an examination had a racially disproportionate impact is not sufficient to make out such a case, and expressly noted the Supreme Court's disagreement with this Court's decision (No. 71-2021, 458 F.2d 1167, decided April 5, 1972) holding to the contrary in affirming the issuance of a preliminary injunction herein?

2. Was it error for the district court to require defendant Board of Examiners to administer the Revised Plan for selecting and licensing supervisors in the New York City school system and to prohibit the Board of Examiners from preparing and/or administering any other means or method of selecting and/or licensing supervisors, where:

(a) The Revised Plan was developed by defendants Board of Education and Chancellor, together with plaintiffs, despite the fact that New York State law mandates that the Board of Examiners has exclusive control over the preparation and administration of examinations for all pedagogical and supervisory personnel in the New York City school system?

(b) The effect of the Revised Plan will be fundamentally to alter New York State's constitutional and statutory scheme by (i) interfering with the Examiners' duty of determining the fitness of candidates for supervisory positions, (ii) eliminating the statutory requirement that each candidate for such a supervisory position pass an "objective examination", and (iii) eliminating the statutory re-

quirement that before a person may serve as a supervisor in the New York City school system, that person must first have satisfied the education and experience requirements promulgated for that position *and* have passed an objective examination prepared and administered by the Board of Examiners?

(c) The Board of Examiners did not consent to the entry of the Judgment appealed from, no trial was had and the effect of that Judgment is to impose substantial restraints upon the Board of Examiners going well beyond those agreed to in the prior judgment?

(d) All parties agreed at the time of the entry of the March 25, 1975 Order approving and incorporating the Permanent Plan as part of the Final Judgment that the Permanent Plan was a constitutional means of selecting and licensing supervisory personnel in the New York City school system?

(e) The Revised Plan does not require job analyses as a prerequisite to the preparation of future supervisory selection and licensing procedures, although such job analyses were specifically called for by this Court?

(f) None of the reasons advanced by defendants Board of Education and Chancellor or by plaintiffs for seeking the "modification", and thus the substitution of the "Revised Plan" for the "Permanent Plan", constitutes new and unforeseen changed conditions, and no showing was made that the Permanent Plan subjected anyone to oppressive hardship or grievous wrong?

(g) Defendant Board of Education previously took an inconsistent position in this case in 1973 and 1974 when it

argued in the district court and in this Court that a supervisory examination system which would permit a candidate to be licensed only after complying with the promulgated education and experience requirements for that supervisory position and passing an on-the-job evaluation would violate the requirements of New York State's Constitution and its Education Law?

(h) The Board of Education and Chancellor have "unclean hands" since they have failed and refused to carry out in good faith their obligations under the Permanent Plan?

3. Was it error for the district court to refuse to require that all parties adhere to the Permanent Plan where:

(a) All parties in this action had over a period of almost three years jointly developed and agreed upon the Permanent Plan for new supervisory examinations and had submitted it to the district court as being consonant with the requirements of New York State law and the requirements of the United States Constitution?

(b) The Board of Examiners is the agency specifically created by New York State law to prepare and administer all examinations for supervisory personnel in the New York City school system and it wished to proceed with the preparation, and subsequently, the administration of supervisory examinations and issuance of licenses pursuant to the Permanent Plan?

(c) Over a year had passed since the entry of the March 25, 1975 Order and the Board of Education had still not taken the initial step to permit implementation of the Permanent Plan since it had failed and refused to adopt three

prototype job analyses and, unless those prototypes were adopted, no further job analyses could be prepared, and no supervisory examinations could be prepared and administered?

Statement of the Case

This action was commenced in September 1970 by the filing of a complaint alleging that prior examinations prepared and administered by defendant Board of Examiners for selection and licensing of supervisors in the New York City school system discriminated against blacks and Puerto Ricans in violation of the Fourteenth Amendment and failed to accord with the requirements of New York State law. The complaint sought to enjoin the Board of Examiners from giving such examinations to determine the "merit and fitness" of applicants ". . . which ha[d] not been prepared and validated in accordance with the latest standards of professional psychological testing . . ." and the requirements of New York law (I-34-35a).*

Plaintiffs' Preliminary Injunction Motion

Plaintiffs moved for a preliminary injunction and, in connection with the motion, the district court ordered defendants to gather statistics regarding the comparative pass/fail rate of blacks, Puerto Ricans and whites during the preceding seven years. 330 F. Supp. 203, 209. On the basis of that data the court found a substantial disparity in the examination performances of blacks and Puerto Ricans compared to whites, and held that this disparity evidenced

* Numbers followed by "a" in parentheses or brackets refer to volume and page of the Joint Appendix.

a *prima facie* case of *de facto* discrimination. Despite its finding that no purposeful or intentional discrimination was practiced, the district court also held the Examiners' tests violated the Constitution, unless a "strong showing" was made by the Examiners that the tests were job-related. The court then concluded that the Examiners failed to meet this "heavy burden" and issued a preliminary injunction (II-257-259a) barring the administration of a particular scheduled examination or any other examination until the Examiners revised their tests to meet the standards articulated in the court's decision.* 330 F. Supp. 203.

On appeal, this Court affirmed the entry of the preliminary injunction (Appeal No. 71-2021, 458 F.2d 1167, decided April 5, 1972). Basically, this Court agreed with the district court's legal analysis and concluded that the district court did not abuse its discretion and was not clearly erroneous with respect to its factual findings and conclusions.**

Both Judge Mansfield in his decision on the preliminary injunction (330 F. Supp. at 224) and this Court in its affirmance (458 F.2d at 1179) expressed the expectation that new examinations would be speedily developed by the Examiners as a result of this case.

---

* Throughout the proceedings in the district court leading to the entry of a preliminary injunction, and then on appeal to this Court from that order, the Board of Education took a neutral stance and did not defend. Its position was that since supervisory examinations were "the sole statutory responsibility" of the Board of Examiners, it, rather than the Board of Education, should defend (I-701a, 763-764a). The Board of Education has never answered plaintiffs' complaint.

** In a number of places in this Court's 1972 decision, it was stressed that not all members of this Court's panel might have made the same factual findings or drawn the same inferences. *See* 458 F.2d at 1173 (regarding the "racially discriminatory effect" of the tests) and at 1175 (regarding the job-relatedness issue).

The 1973 Consent Judgment

Following this Court's 1972 decision, the Board of Examiners moved in the district court on June 1, 1972 to modify the preliminary injunction, in accordance with its terms (II-259a), to permit the development and administration of new examinations pursuant to a proposal submitted therewith (I-46-63a). On the return date, Judge Mansfield, asserting that the parties were more knowledgeable than the court about the creation of future test procedures, urged both sides to make a serious effort to reach agreement on a plan for new examinations (I-114-116a, 124a).

Thereafter, the parties commenced settlement discussions which almost one year later led to the execution of a Stipulation of Settlement by plaintiffs and defendants Board of Examiners and Chancellor of the City School District (I-126-155a). Pursuant to the terms of that Stipulation of Settlement, a Final Judgment on Consent was entered on July 12, 1973 with respect to defendants Board of Examiners and Chancellor (the "Consent Judgment") (I-251-259a). Simultaneously, the district court entered a parallel order with respect to defendant Board of Education which had refused to agree to the settlement* (I-260-267a).

---

* Because the Board of Education had failed to answer the complaint, yet refused to join in the Stipulation of Settlement, plaintiffs moved for a default judgment against the Board (I-169-190a). While the district court was not willing to enter a default judgment (I-200-208a), it did enter the parallel order referred to above. The Board of Education appealed from that parallel order and this Court affirmed. (Appeal No. 73-2320, 496 F.2d 820, decided April 12, 1974). The Board of Education vigorously argued in both the district court and this Court that the "interim" system of on-the-job performance evaluations authorized by the Consent Judgment violated New York State law (I-203-204a, 238-242a, 628-629a, 703a).

The Stipulation of Settlement and the Consent Judgment called for a two part settlement (I-617-618a, 621-624a). Part one provided for an "interim" system for the selection and licensing of supervisors essentially through on-the-job performance evaluations conducted by the Board of Examiners. Thus, supervisors appointed on an acting basis in accordance with the preliminary injunction (II-258-259a) could expeditiously be evaluated and obtain licenses without passing the customary plenary examination.* Part two was an undertaking by the Board of Examiners and plaintiffs to continue settlement discussions through a task force of their representatives in order to, in the words of the Stipulation of Settlement,

> "... develo[p] and recommen[d] a new comprehensive supervisory selection system for the New York City School System which will provide for the selection of supervisors in the future on the basis of 'merit and fitness' and without unlawful discrimination. . . ." (I-127-128a)

Both the Stipulation of Settlement (I-128a, 132a, 134-136a, 138a) and the Consent Judgment (I-254a, 256-259a)** expressly contemplated that, at a subsequent time, the "interim" system would be phased out and would be replaced by a permanent plan for a comprehensive system of plenary examinations, which plan would be incorporated as part of the Consent Judgment.

---

* In fact, over 1,100 supervisors have to date been licensed through this "interim" system, many of them members of plaintiffs' class (I-696a).

** *See* especially pars. VII, VIII, IX, X and XIV of the Consent Judgment.

The Permanent Plan for Plenary Examinations

Thereafter, the task force continued discussions in an effort to arrive at an agreement upon the terms of a permanent plan for plenary examinations. Finally, on May 24, 1974, after hundreds of hours of negotiations and public and private meetings (I-202a, 314a, 459a-5, 622a, 704-705a), the parties submitted to the district court the Permanent Plan which was acknowledged by all parties as having been developed by, and agreed to, by all parties (I-272-280a). Plaintiffs' counsel expressly stated at that time that the Permanent Plan had been agreed upon by them, except for two unresolved issues (I-276-277a) which the parties agreed to submit to the court for resolution.*

During the proceedings to resolve the two open issues, the parties continued to adhere to their agreement upon the Permanent Plan. Thus, when defendants moved, by notice of motion dated December 20, 1974, for an order approving the Permanent Plan, incorporating it as part of the Consent Judgment and permitting the administration of new supervisory examinations, pursuant to it, the Plan as initially submitted in May 1974 was not changed, except to set forth defendants' proposed solution to the two unresolved issues** (I-307-343a). Defendants did not change any aspect

* The two issues which the parties were unable to agree upon, and which the court later resolved, did not pertain to the nature and scope of future supervisory examinations. Those issues were: (1) provisions regarding reporting by defendants to plaintiffs during the course of implementing the new Permanent Plan; and (2) a procedure for selecting consultants to be used by defendants to undertake certain functions under the Permanent Plan.

** Thus, the Permanent Plan annexed to defendants' motion identified consultants of defendants' choosing and included defendants' proposed reporting requirements (I-321-322a, 337-340a).

of the Permanent Plan, even those parts which went well beyond the requirements of law and which were included originally because of compromises arrived at during negotiations with plaintiffs (I-314-315a, 316-340a, 705-706a).

Likewise, plaintiffs' January 3, 1975 motion seeking resolution of the two unresolved issues in their favor expressly stated that they "... submitted the Plan in exactly the form previously furnished to the Court, except for the contested provisions on consultants and reporting" (I-349a). Plaintiffs' motion papers reiterated that they had agreed upon the Plan which had been jointly submitted in May 1974 and that the Plan was the basis for non-discriminatory, job-related examinations (I-348-349a).

At the hearing held with respect to the two motions on January 14, 1975, plaintiffs reaffirmed that they had agreed upon the Permanent Plan initially submitted in May 1974. Thus, for example, plaintiffs' counsel stated:

> "The interest the plaintiffs have is in getting a valid and nondiscriminatory licensing system as soon as possible and to that end we have striven very hard to reach an agreement on the basic guidelines and have concurred in this basic plan" (I-459a-460a).

The March 25, 1975 Order

On March 25, 1975 the district court entered an Order Modifying Final Judgment and Order (the "March 25, 1975 Order") (I-506-538a) which (a) approved the Permanent Plan submitted by the parties in May 1974 (with additions relating solely to the two previously unresolved issues), incorporated it as part of the Consent Judgment and au-

thorized defendants to prepare and administer examinations pursuant to it and thereafter issue licenses based upon the results of such examinations;* and (b) because the Board of Education had previously agreed to be bound by the Consent Judgment, made that Judgment applicable to all the parties in the action.** No party appealed from the March 25, 1975 Order.

---

* Thus, the March 25, 1975 Order provides in part:

> "WHEREAS, *all parties herein agreed upon a Plan for such plenary examinations*, except that they did not agree on the method for choosing the consultants to be used by defendants under the Plan and they did not agree upon a reporting provision, *and they submitted the Plan to this court on May 24, 1974*; . . . .
>
> * * *
>
> VI. The Plan for a comprehensive system of plenary examinations for supervisors in the New York City School System which was annexed as an exhibit to the affidavit of Murray Rockowitz, sworn to December 20, 1974, and a copy of which is annexed hereto and made a part hereof (the "Plan"), is approved as herein modified, and, notwithstanding any other provision in the July 12, 1973, Judgment and Order, defendants are permitted and authorized to develop examinations for supervisory positions and thereafter to administer and conduct such examinations, to process and grade such examinations, to promulgate eligible lists and to issue licenses based upon such examinations, all in accordance with that Plan." (Emphasis added.) (I-507a, 509a)

The only "modifications" or changes in the Permanent Plan made by the district court related to one of the previously unresolved issues, *i.e.*, reporting provisions.

** Thus, the March 25, 1975 Order also provides:

> "WHEREAS, the court has received a letter dated March 10, 1975, from the Board of Education [I-504a] indicating its consent to the entry against it of the Final Judgment of July 12, 1973, previously entered against the Board of Examiners; . . . .
>
> * * *
>
> IV. As of the effective date of this Order, the provisions of the Final Judgment of July 12, 1973, as modified, shall apply fully to all of the defendants, and all the defendants shall be bound thereby." (I-508-509a)

Defendant Board of Education Failed to Carry Out Its Responsibilities Under the Permanent Plan

The Permanent Plan set forth a two step process of examination procedures whereby successful candidates would receive permanent licenses. That process was accurately summarized in the affidavit of Examiner Murray Rockowitz, sworn to April 19, 1976, submitted to the court below:

> "19. By its terms, the Plan 'outlines a procedure for the development of examinations by the Board of Examiners to fulfill its statutory responsibility' to provide 'objective', non-discriminatory examinations to determine 'merit and fitness' (Plan, p. 1). The new examination procedures are to be a two-step process. First, a 'Step 1' plenary examination will be administered to all applicants to screen out 'those who fail to meet levels of minimum acceptable performance'. Persons who pass will receive a provisional license. This examination is to be prepared by the Board of Examiners based upon a job analysis of the supervisory position prepared by the Board of Education. Second, a 'Step 2' on-the-job performance evaluation will be administered by the Board of Examiners to persons who have a provisional license and who serve on the job in a position for one year. Those who are successful are to receive a permanent license.
>
> 20. Initially, the Plan requires the Board of Examiners, utilizing an independent consulting firm, Development Dimensions, Inc., to prepare Step 1 examinations for three prototypical supervisory positions. Before those prototype examinations can be prepared, however, prototype job analyses are to be developed by the Board of Education utilizing its independent consulting firm, American Institutes for Research.

> Both the prototype job analyses and the prototype Step 1 examinations are then to serve as models to aid in the preparation of analyses and examinations for each supervisory position." (I-624-625a)

As noted above, the terms of the Permanent Plan pertaining to the nature and scope of these future supervisory examinations had been finalized by as early as May 1974 when the Plan was initially submitted to the district court. By December 1974 the Board of Education had retained American Institutes for Research ("AIR"), its consultant, and by "the Spring of 1975" the three prototype job analyses had been turned over to the Board of Education by AIR (I-386a, 782a). Yet, many months went by without the Board of Education formally adopting and delivering those job analyses to the Board of Examiners (I-634-635a, 782-783a) so that the prototype Step 1 examinations could be developed.

After repeated attempts by the Board of Examiners to secure action from the Board of Education without the necessity for judicial intervention (I-634-637a), in January 1976 defendant Board of Examiners requested and Judge Pollack held a pre-motion conference with regard to defendant Board of Examiners' complaint that defendants Board of Education and Chancellor were not diligently proceeding to carry out their responsibilities under the Permanent Plan. Counsel for defendants Board of Education and Chancellor represented to Judge Pollack at that time that their clients were proceeding in good faith but needed additional time, and Judge Pollack adjourned the pre-motion conference for six weeks in order to permit them to carry out their initial responsibilities under the Permanent Plan (I-638-639a).

In March 1976, at the second pre-motion conference, counsel for defendants Board of Education and Chancellor announced to the district court that, instead of implementing the Permanent Plan, as they had previously agreed and represented, those defendants wished to move to "modify" the Consent Judgment and March 25, 1975 Order in order to substitute a different plan for supervisory selection and licensing which would do away with the requirement that job analyses be prepared (I-639a).

The Motions to "Modify", and to Implement, the Consent Judgment and the March 25, 1975 Order

In April 1976, still without having carried out their responsibilities under the Permanent Plan, defendants Board of Education and Chancellor moved to "modify" the Consent Judgment and March 25, 1975 Order to delete authorization to prepare and administer supervisory examinations pursuant to the Permanent Plan and to substitute the "Revised Plan" which had been prepared by defendants Board of Education and Chancellor, after discussions with plaintiffs' counsel (I-581-613a). The Revised Plan provides for a selection and licensing system totally unlike that set forth in the Permanent Plan which had been agreed to by all of the parties and approved by the district court in the March 25, 1975 Order (*cf.* I-513-538a *with* I-583-590a).

Thereafter, also in April 1976, defendant Board of Examiners formally moved to implement the Permanent Plan in accordance with its terms (I-615-646a).

On June 1, 1976, the return date of the two motions, plaintiffs' counsel again conceded that the Permanent Plan

set forth a constitutional system for selection and licensing (I-907-908a). Nevertheless, Judge Pollack held, from the Bench, without any trial or evidentiary hearing, and without making any findings of fact, that the motion of the Board of Education and Chancellor to "modify" would be granted with one revision and that a judgment to such effect should be settled (I-929-931a, 945a). Thereafter, on July 7, 1976, the district court entered the Judgment from which defendant Board of Examiners appeal (I-947-958a).

On June 7, 1976 the Supreme Court of the United States rendered its decision in *Washington* v. *Davis*, 44 U.S.L.W. 4789, in which it held that this Court's decision affirming the entry of a preliminary injunction in this case had been erroneously decided.

ARGUMENT

I

The Consent Judgment Herein Should Be Vacated and This Case Dismissed in Its Entirety Because of the United States Supreme Court's Decision in *Washington* v. *Davis*.

The Supreme Court's decision in *Washington* v. *Davis*, 44 U.S.L.W. 4789 (June 7, 1976), effectively reversed the predicates upon which a preliminary injunction was granted by the district court in this case and affirmed by this Court. 330 F. Supp. 203 (1971), *aff'd*, 458 F.2d 1167 (1972). The Supreme Court held in *Washington* v. *Davis* that, absent proof of purposeful discrimination, a test which had a racially disproportionate impact is not unconstitutional be-

cause an *intent* to discriminate must be shown to establish a constitutional violation under the Equal Protection Clause. Thus, while the courts in this case, in interpreting the Equal Protection Clause of the Fourteenth Amendment, held that a racially disproportionate impact of a test established a *prima facie* case of racial discrimination, even though there was no intent to discriminate, the Supreme Court in *Washington* held that a test which disproportionately affects minorities is not unconstitutional unless a "racially discriminatory purpose" is proven. In view of the *Washington* decision, the Consent Judgment here—which was based upon this Court's prior decision to the contrary—should be vacated and, in view of the drastic changes which have occurred during the pendency of this case, it should be dismissed in its entirety.*

---

* There can be no question that the Supreme Court's enunciation of the governing law in *Washington* v. *Davis* can properly be raised before this Court on this appeal. It has long been recognized that an appellate court must apply the law in effect at the time of its decision even if the law was different at the time of the lower court's decision. *See e.g., Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78 (1943); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, 27 (1940); *United States* v. *Chambers*, 291 U.S. 217 (1934); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Thus, in *Schooner Peggy*, the Supreme Court held:

> ". . . if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the [appellate] court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

Moreover, even though an appellate court may have previously decided an issue, if the law has changed, it should reverse its initial decision during a subsequent appeal of the case. *See e.g., Jones* v. *Schellenberger*, 225 F.2d 784, 790-791 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *McComb* v. *Crane*, 174 F.2d 646 (5th Cir. 1949) (reversing a judgment on a second appeal because of an intervening Supreme Court decision changing the law). *Cf. Perrone* v. *Pennsylvania R.R. Co.*, 143 F.2d 168 (2nd Cir. 1944).

A. *Washington* v. *Davis* effectively reversed the preliminary injunction decisions in this case

In view of the *Washington* holding, the rulings in this case on plaintiffs' motion for a preliminary injunction must be overturned.

1. The Decision in Washington *v.* Davis

In *Washington* v. *Davis,* plaintiffs claimed that their applications to become police officers were rejected because of a discriminatory personnel test. No claim of intentional or purposeful discrimination had been made; instead it was simply asserted that the test bore no relationship to job performance and had a discriminatory *effect* against blacks.

On cross-motions for summary judgment, the district court found that, although the test may not have been properly validated and may have had a discriminatory impact on blacks, it was not unconstitutional. *Davis* v. *Washington,* 348 F. Supp. 15 (D.D.C. 1972).

On appeal, the Court of Appeals for the District of Columbia Circuit, applying the standards set forth in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), for employment discrimination cases brought under Title VII of the Civil Rights Act of 1964,* reversed. *Davis* v. *Washington,* 512 F.2d 956 (D.C. Cir. 1975).

In turn, the Supreme Court reversed the D.C. Circuit's decision. The Court held that in cases brought under the

* *Griggs* held that under Title VII proof of a test's discriminatory effect is sufficient to establish a violation without proof of intent to discriminate, unless it is proven by the defendant that the test is job-related.

Constitution—as distinguished from Title VII—the standards enunciated in *Griggs* are *not* applicable. 44 U.S.L.W. at 4791, 4794. The Court noted that under Title VII, plaintiffs may succeed by ". . . focus[ing] solely on the racially differential impact of the challenged hiring . . . practices", but that "[t]his is not the constitutional rule", 44 U.S.L.W. at 4792. Rather, the Court held that under the Constitution the plaintiff has the burden of establishing that the practices reflect a racially discriminatory purpose or intent:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 44 U.S.L.W. at 4792 (Emphasis in original).
>
> * * *
>
> "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule [citation omitted] that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." 44 U.S.L.W. at 4793.

The Court further explained that the test's purpose—to determine whether prospective police officers have a certain level of verbal skill—was sufficient to justify the test, even though more blacks than whites may have failed it:

> "As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification

> for employment is nevertheless racially discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.
>
> * * *
>
> [I]t is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly when the job requires special ability to communicate orally and in writing." 44 U.S.L.W. at 4794.

The Court concluded that "the test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue." *Id.*

Finally, the Supreme Court specifically held that this Court's decision on the preliminary injunction motion in this case was erroneous. Thus, Mr. Justice White's Opinion of the Court held:

> "[V]arious Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] . . . [T]o the extent that these cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

---

n.12. Cases dealing with public employment include: *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176-1177 (CA 2 1972). . . ." 44 U.S.L.W. at 4793-4794.

This holding led Mr. Justice Brennan in his dissenting opinion to conclude that the Supreme Court had "effectively reversed" each of the lower court decisions listed in footnote 12 of the Opinion of the Court. 44 U.S.L.W. at 4796.

2. *The Impact of* Washington *v.* Davis

The holding in *Washington* effectively reversed the prior decisions by the district court and this Court on the preliminary injunction motion in this case. As shown below, those decisions erroneously applied the rules previously enunciated in *Griggs* for Title VII cases. Consequently, the courts permitted plaintiffs to succeed on their preliminary injunction motion solely by presenting proof that the Examiners' tests resulted in a disproportionate rate of failures for blacks and Hispanics, despite a finding that no intentional discrimination existed.

Solely as a result of statistical proof, the district court and this Court concluded that the Examiners' tests had ". . . the *de facto* effect of discriminating significantly and substantially . . ." against plaintiffs. 330 F. Supp. at 214, *aff'd*, 458 F.2d at 1172-1173, 1176 (showing was made of a statistical "disparity of sufficient magnitude to amount to a *prima facie* case of invidious *de facto* discrimination"). But although they also found that such discrimination was not purposeful, they ruled that a Fourteenth Amendment violation could still be established. Thus, as this Court held in its 1972 decision:

> "Concededly, this case does not involve intentionally discriminatory legislation [citation omitted], or even a neutral legislative scheme applied in an inten-

> tionally discriminatory manner [citation omitted]. Nonetheless, we do not believe that the protection afforded racial minorities by the fourteenth amendment is exhausted by those two possibilities." 458 F.2d at 1175. *See also* 330 F. Supp. at 215.

As shown above, this very reasoning and result were rejected by the Supreme Court in *Washington* v. *Davis*.

Then, based solely upon the statistical disparity in pass-fail rates, the district court and this Court shifted the burden to the Examiners to make a "strong showing" that its tests were job-related. Thus, although the district court held that *Griggs* was "not controlling", 330 F. Supp. at 215, it went on to enunciate and apply the *Griggs* standard:

> "We are satisfied that where, as here, plaintiffs show that the examinations result in *substantial* discrimination against a minority racial group qualified to take them, a strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given." 330 F. Supp. at 216. (Emphasis in original.)

Moreover, this Court in 1972 held:

> "[O]nce such a *prima facie* case was made, it was appropriate for the district court to shift to the Board *a heavy burden* of justifying its contested examinations by at least demonstrating that they were job-related. . . . [O]nce discrimination has been found, it would be *anomalous* at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. See Title VII of the

> Civil Rights Act of 1964 . . .; Griggs v. Duke Power Co. . . . The anomaly would only be emphasized by the recent passage of the Equal Employment Opportunity Act of 1972, which broadened Title VII to include state and city public employers." 458 F.2d at 1176-1177. (Emphasis added.)*

Yet, the Supreme Court, in *Washington* v. *Davis,* approved the very situation which this Court in 1972 held to be "anomalous" since it expressly rejected the application of the *Griggs*-Title VII standards to Fourteenth Amendment cases such as this one.

In short, *Washington* v. *Davis* teaches that plaintiffs had the burden of proving that the examinations in question here *purposefully* discriminated against minorities. But the findings in this case show that no such purposeful discrimination existed here. Accordingly, this Court should now reverse its 1972 decision and vacate the Consent Judgment.**

---

* The instant case was brought under the Fourteenth Amendment to the United States Constitution. At the time it was commenced in 1970 Title VII did not apply to governmental employees. Despite the amendment to Title VII in 1972, plaintiffs made no attempt to amend their complaint to add a Title VII claim until September 1975, over two years after the July 1973 Consent Judgment and well after the district court had entered its March 25, 1975 Order incorporating the Permanent Plan as part of that Consent Judgment. In September 1975, as a tactical maneuver in an attempt to bolster their ability to recover attorneys' fees, plaintiffs moved for leave to amend (I-545-548a). That motion was denied by the district court in February 1976 (I-554-574a). Thus, this case began, and remains, a Fourteenth Amendment case, not a Title VII case.

** Because both the district court and this Court in their preliminary injunction decisions primarily focused on statistics, they gave little or no credence to the abundant evidence—including independent expert opinions, and a question-by-question breakdown of two sample supervisory examinations—indicating, at the very least, that

(footnote continued on next page)

B. In view of *Washington* v. *Davis*, the Consent Judgment herein should be vacated

1. The Consent Judgment was based upon the erroneous preliminary injunction decisions

The Consent Judgment in this case* was based upon the decisions of the district court and this Court on plaintiffs' preliminary injunction motion (I-200-203a, 620-622a). In fact, the district court decisions invited the Examiners to reconsider its examination procedures in light of the principles expressed therein, 330 F. Supp. at 224 (II-254-255a), and this Court noted the possibility that ". . . new testing procedures will be devised by the parties themselves

---

the Examiners' tests were part of a rational scheme for selection of supervisors. That evidence showed that the tests were based upon a description of job requirements prepared by the Board of Education and that the test tasks closely correlated to the duties of the particular position. Thus, an acknowledged expert in educational psychology, Professor Robert L. Thorndike of Teachers College, Columbia University, concluded:

> "[T]he Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job." (II-68a)

Similarly, the affidavits of other independent experts in educational psychology demonstrated the objectivity, validity, reliability and relevance of the tests. *See* the affidavits of Dr. Marvin Sontag, Associate Professor of Psychology and Education at Teachers College, Columbia University (II-71-73a); Dr. Esin Kaya Carton, Professor and Chairman of the Educational Psychology Department at Hofstra University (II-83-85a); and Associate Professor Aaron Suss Carton, State University of New York at Stony Brook (II-75-81a).

* When the Consent Judgment was entered in July 1973 it related to defendants Board of Examiners and Chancellor. Thereafter, in March 1975, the Board of Education agreed to be bound by that Judgment and the March 25, 1975 Order formally made the Consent Judgment applicable to all parties herein.

and be approved by the district court". 458 F.2d at 1179. Thereafter, Judge Mansfield suggested that the parties attempt to reach agreement upon new examinations (I-114-116a, 124a). Negotiations between the parties which commenced shortly thereafter led to the Stipulation of Settlement (I-200-203a, 621a) and the Consent Judgment.

In light of this direct relationship between the Consent Judgment and the erroneous decisions on the preliminary injunction motion, that Judgment should now be vacated.

2. *The Examiners' consent to the July 1973 Judgment does not bar relief from that Judgment*

The act of agreeing to the Consent Judgment does not bar the Examiners from now claiming that it should be overturned because of a change in law. For purposes of modification or vacation due to a change in law, consent decrees are treated no differently than litigated judgments. *System Federation* v. *Wright*, 364 U.S. 642 (1961); *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975). *System Federation* is the seminal case on modification of consent decrees due to a change in law. When plaintiffs began that action and when the consent decree was entered, the Railway Labor Act forbade union shop agreements. Plaintiffs claimed that they were discriminated against because they were not union members and the parties settled by way of a consent decree which enjoined defendants from discriminating against non-union employees because of their failure to join a union.

Thereafter, the Act was amended to permit union shop agreements and defendant unions moved to vacate the con-

sent decree. The Supreme Court held that consent decrees must be modified when intervening law renders the prospective effect of the decree inequitable, 364 U.S. at 647-648, and that:

> "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. . . . [T]he adopting court must . . . be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of the Act when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." 364 U.S. at 651-652.

Similarly, in *Theriault* v. *Smith,* the defendant agreed to grant "aid to families with dependent children" benefits to women on behalf of their unborn children. *See* 519 F.2d 809 (1st Cir. 1975). Subsequently, the United States Supreme Court rendered a decision* which held that states are not required to offer such benefits for unborn children. The district court granted defendant's motion to vacate that consent decree and the First Circuit affirmed, holding:

> "*The Supreme Court's decision . . . represented a fundamental change in the legal predicates of the consent decree.* This is arguably the kind of situation in which relief should be available under Rule 60(b)(5). . . . It may well be unreasonable to require defendant, for the indefinite future, to abide by a consent decree based upon an interpretation of law that has been ren-

* *Burns* v. *Alcala,* 420 U.S. 575 (1975).

dered incorrect by a subsequent Supreme Court decision." 523 F.2d at 601-602.* (Emphasis added.)

Here, as in *System Federation* and *Theriault*, the Supreme Court's decision in *Washington* v. *Davis* ". . . represented a fundamental change in the legal predicates of the consent decree." Moreover, as in those other cases, it would be "unreasonable" and inequitable to require the Examiners to abide by a decree which is based upon an erroneous interpretation of the Constitution.

3. The Consent Judgment should be vacated

Continued enforcement of the Consent Judgment—based, as it was, on erroneous expressions of the governing law—would indefinitely enjoin defendants from pursuing methods of testing which are perfectly valid and legal. Surely, defendants should not be so restricted in their actions merely because they abided by this Court's interpretation of the Constitution which has now been definitively held to be erroneous. Rather, this Court should, in addition to reversing its 1972 decision, dissolve the prospective application of the Consent Judgment.**

C. This case should be dismissed in its entirety

The Examiners urge that, in light of *Washington* v. *Davis*, not only should the Consent Judgment be vacated, but, in addition, this case should be dismissed in its en-

---

* *See also Elgin National Watch Co.* v. *Barrett*, 213 F.2d 776 (5th Cir. 1954) (dissolved prospective application of permanent injunction against violation of state fair trade law after the Supreme Court held that such a law may be unenforceable).

** The Examiners seek to vacate the Consent Judgment insofar as it now has *prospective* application. They do not wish to disturb licenses issued, or other rights, privileges or perquisites obtained, under that Judgment.

tirety. *Washington* v. *Davis* shows that the courts and the parties have gone off in the wrong direction during the pendency of this action. But during the pendency of this action there have been drastic changes in the facts, in the nature of the parties and in the law governing future employment examinations. As a result, the continuation of this action would improperly impose upon the time of the courts and of the parties for no reason.

As noted above, there has been a series of drastic changes pertaining to this case since 1970. First, this case was brought in 1970 to challenge employment selection practices in existence prior to that time. But those old examinations and the resulting eligible lists are no longer used and no longer have any meaning. Moreover, the Examiners have indicated both by their June 1972 proposal for a new examination system (I-46-63a) and by their consent to the Permanent Plan in 1974 and 1975 that they are wedded to methodologies of employment selection different from those challenged by plaintiffs in this action.

Second, even assuming *arguendo* that the rights of plaintiffs and their class were violated prior to the commencement of this action, those persons have already received their remedy. The old examination system has been enjoined until now. As a result of the "interim" selection system of on-the-job evaluations authorized by the 1973 Consent Judgment, over 1,100 supervisors have been licensed, including many of the members of plaintiffs' class (I-696a). And plaintiffs' class has also received preferential treatment with respect to transfers between supervisory jobs (*see* 7 CCH EPD ¶9084 [S.D.N.Y. 1973]) and

excessing of supervisors (*see* 534 F.2d 993 [2nd Cir. 1976]). The Examiners do not wish to disturb these results.

Third, this case was brought under the Fourteenth Amendment and Sections 1981 and 1983 of Title 42, U.S. Code. When it was brought, Title VII of the Civil Rights Act of 1964 did not apply to governmental employees. Although Title VII now applies to such employees, it has no application to this case since (1) plaintiffs have not complied with the procedural and administrative prerequisites to a judicial action; (2) the Consent Judgment bars plaintiffs from seeking further relief based upon the claims in this case (I-258a); (3) plaintiffs have never moved to amend their complaint to add Title VII claims for all purposes; and (4) the district court denied (I-554-574a)* plaintiffs' motion to add Title VII claims for the limited purpose of seeking to recover attorneys' fees (I-545-548a) and plaintiffs never appealed from that ruling.

Thus, the anomalous situation exists that should this case continue, Title VII does not apply to it. On the other hand, should this case be dismissed, as the Examiners seek, plaintiffs would always be free to seek relief under Title VII if an alleged wrong occurs in the future.

Fourth, as noted earlier, the parties have also changed since this case began. When this case began the membership of the Board of Examiners consisted of its Chairman, Gertrude E. Unser, as well as members, Jay E. Greene, Murray Rockowitz and Paul Denn (I-27-28a). Unser, Greene and Denn retired long ago. Initially, two provisional examiners were appointed in July-August 1972 (I-

* In the course of that decision, Judge Pollack held that plaintiffs could not amend because they had not complied with Title VII's procedural and administrative prerequisites and because of the Consent Judgment's injunction against further relief (I-560-561a).

71a, 112a). Thereafter, on September 5, 1974 three new members of the Board of Examiners were appointed: Clarence C. Holmes, currently its Chairman, Ethel Fitzgerald, currently its Vice Chairman, and Julius R. Rubin. Rockowitz is currently on leave.*

Moreover, the membership of the Board of Education has changed. When this case began it was an interim board of five members (I-27a) and today it is a permanent board of seven members with only one active member a holdover from the earlier interim board.**

Dismissal would not harm the plaintiffs, would remove the burden of this unnecessary litigation from the courts and the parties, and would clearly accord with established principles of law. First, it has been repeatedly recognized that even where a prior violation of law has been established (which is not the case here), an injunction against future violations is not proper unless the movant can show that such relief is actually necessary because of a real danger of recurrent violation. *See e.g., United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (cessation of activity); *Caprio* v. *Wilson*, 513 F.2d 837 (9th Cir. 1975) (change in law); *Robert Stigwood Group, Ltd.* v. *Hurwitz*, 462 F.2d 910 (2nd Cir. 1972) (cessation of activity).† In light of

* Judge Mansfield commented in his preliminary injunction decision that at the commencement of this action all members of the Board of Examiners were white. 330 F. Supp. at 223. That condition has not been true since mid-1972 since of the two provisional examiners, one was black and one was Puerto Rican; and two members of the current Board of Examiners are black.

** In addition, the Chancellor today is different from 1970.

† This principle has been applied in cases of constitutional dimension. *See e.g., Brown* v. *Board of Education*, 386 F. Supp. 110, 126 (N.D. Ill. 1974); *Washington Free Community* v. *Wilson*, 334 F. Supp. 77, 80 (D.D.C. 1971), *aff'd*, 484 F.2d 1078 (D.C. Cir. 1973).

the foregoing changes and of the Supreme Court's ruling in *Washington* v. *Davis,* the likelihood that future supervisory examinations will violate the Fourteenth Amendment is indeed remote. Consequently, there is no need for any injunction in this case.

Furthermore, in cases such as this one where circumstances have drastically changed, appellate courts have dismissed cases on the rationale that the plaintiff could commence a new lawsuit if it believed that the challenged activities were still unlawful. *See e.g., Washington* v. *Davis,* 44 U.S.L.W. at 4795-4796 (where the Supreme Court refused to remand that case for further proceedings based in part on the fact that the challenged selection system had been substantially modified and that plaintiffs could bring a Title VII action if the modified system was believed to be unlawful);* *Gulf Oil Corp.* v. *Simon,* 502 F.2d 1154 (Temp. Emergency Ct. App. 1974).

---

* The pertinent portion of the Supreme Court's decision in *Washington* v. *Davis* reads as follows:

> "The federal parties, whose views have somewhat changed since the decision of the Court of Appeals and who still insist that training program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before him, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that section." 44 U.S.L.W. at 4795-4796.

In *Gulf Oil* the district court rejected Gulf's claim to enjoin enforcement of mandatory oil allocation regulations. When new regulations went into effect, Gulf claimed that its case for equitable relief was even stronger. The Court of Appeals affirmed the dismissal of Gulf's claim and refused to remand the case for consideration in light of the new regulations, holding:

> "This suit sought equitable relief from particular regulations and proceeded to judgment on that controversy. If new considerations provide a basis for challenging the validity of significantly different superceding regulations that now are in effect, that can appropriately be done in a new suit. *Otherwise, an unending series of post-judgment controversies about new subject matter could be litigated under the umbrella of a suit already fully considered and decided.*" 502 F.2d at 1156. (Emphasis added.)

In short, in light of the Supreme Court's decision in *Washington* v. *Davis*, we urge that this Court's prior decision on the appeal from the granting of a preliminary injunction be reversed, that the Consent Judgment based upon that decision be vacated and that this action be dismissed in its entirety.

II

In Any Event, the Judgment Appealed From Should Be Reversed Since It Was Error to Grant the Motion to "Modify," and Deny the Motion to Implement, the Consent Judgment and the March 25, 1975 Order.

A. The motion to "modify" was erroneously granted

By March 1975 all of the parties had agreed to be bound by a Consent Judgment, and the district court entered the March 25, 1975 Order which (a) made the Consent Judgment binding on all parties, and (b) approved the Permanent Plan for new supervisory examinations, incorporated that Plan as part of the Consent Judgment, and authorized defendants to prepare and administer examinations and issue licenses pursuant to it (I-506-538a).

The Judgment entered below did much more than "modify" the Consent Judgment and the March 25, 1975 Order: (1) It forbade defendants from proceeding to develop and administer objective examinations pursuant to the agreed Permanent Plan; and (2) it substituted a new Revised Plan, developed by the Board of Education and Chancellor after negotiations with plaintiffs, without any participation by the Examiners and over their objections. As a result of that substitution, future selection and licensing of supervisors can only be carried out under the Revised Plan.* Thus, the Judgment did not "modify" the prior orders in this case in the sense of merely deleting provisions from a

* This result follows because the July 1973 Consent Judgment enjoined defendants from "conducting further examinations" and "administering examinations" except to the extent authorized (I-252-253a).

decree or making *pro forma* corrections or adjustments. Rather it imposed a completely new set of restraints going well beyond those to which all parties previously agreed.

In imposing such restraints, the district court discarded the heart of the parties' prior agreement. The Permanent Plan, by its very terms, outlined a procedure for the development by the Examiners of ". . . non-discriminatory personnel selection policies without abandoning the essential elements of a merit system . . ." (I-513-514a). Step 1 in the Permanent Plan's achievement of this goal was the creation and administration of objective, job-related, plenary examinations, which were to be based on job analyses developed for the position in question (I-513-519a). These examinations were to be prepared by the Board of Examiners and were to consist of "[a] variety of tests" which might or might "not include written examinations, depending on the needs of the particular situation and the nature of the qualities being evaluated" (I-520a). A Step 1 examination could have included, at the discretion of the Board of Examiners, a combination of situational tests or job simulations, job knowledge tests, tests of communication skills, "tests designed to give an applicant the opportunity to demonstrate his knowledge of special areas that m[ight] be deemed important to Community School Boards" (I-522a), and an "evaluation of the performance of an applicant on the job he currently held" (I-522a). Those individuals found by the Board of Examiners "to meet levels of minimum acceptable performance" (I-513a) were to obtain provisional licenses and were, thus, to be eligible for appointment to a position (I-513a, 520a). After one school year of service, a Step 2 on-the-job performance

evaluation would be administered to provisional licensees by the Board of Examiners and those successful would receive permanent licenses (I-531-532a).

In contrast, the Revised Plan, approved by the district court, eliminates the entire Step 1 from the Permanent Plan. Job analyses for the various supervisory positions are not to be developed. Nor will there be pre-licensure plenary examinations based on such analyses. Thus, under the Revised Plan, every candidate who satisfies the Chancellor's minimum education and experience requirements will receive a provisional license and be entitled to be appointed and to serve as a supervisor* (I-583-585a, 676a). Yet these minimum requirements have *always* been a prerequisite to a candidate's eligibility to seek licensure and to serve as a supervisor.**

Thus, the Judgment entered below not only imposes new restraints on the Examiners, but also prohibits the objective examinations required by New York State law, agreed to by all parties in the Permanent Plan, and required by both the Consent Judgment and the March 25, 1975 Order. All this was done without any trial or evidentiary hearing, and without any findings of fact.

The Judgment appealed from was erroneously entered because: (1) the district court lacked the power to grant

* Under the Revised Plan as approved by the court below, Step 1 is a determination of whether a candidate satisfies the Chancellor's minimum education and experience requirements, and Step 2, after one year on the job, is a performance evaluation (I-583-586a).

** *See* Education Law §2590-j(2) (McKinney 1970). These requirements were applicable under the Permanent Plan and well before then.

the so-called "modification" motion; (2) the "modification" vitiates the New York State constitutional and statutory scheme for the selection and licensing of supervisory personnel in New York City schools; (3) the "modification" eliminates the universally accepted requirement that a job analysis be prepared as a prerequisite to valid employment testing procedures; (4) the effect of the "modification" is to undermine the utility of consent dispositions of protracted litigations and the notion of finality; (5) the Board of Education's inconsistent positions in this case in 1973 and 1974 barred it from obtaining the "modification"; and (6) the failure and refusal of the Board of Education and Chancellor to carry out in good faith their obligations under the Permanent Plan barred the "modification." Set forth below is the basis for each of the foregoing grounds for reversal.

1. The district court lacked the power to grant the so-called "modification" motion

On five separate grounds, the district court lacked the *power* to enter the Judgment appealed from. First, the Judgment below cannot be justified as a "modification" of the prior consent decrees since, without a trial or evidentiary hearing, it imposed substantial restraints upon the Examiners going well beyond those agreed to in the prior decrees.* Second, in addition to the nature of the "modifi-

* Further, even if the Examiners had lost in the lower court after a trial on the merits, the district court would not properly have imposed such restrictions on it. Extensive research has failed to disclose any employment discrimination case involving testing where, after a trial, a court mandated that the defendant employer or testing agency (such as the Board of Examiners) use a particular testing procedure, objected to by the defendant, to the exclusion of all other procedures.

cation", the district court lacked the power to grant the motion because the stringent requirements for any modification of a consent decree were not satisfied. Third, under the circumstances, the district court should have restricted any judicial relief to that which would preserve the essence of the parties' prior agreement. Fourth, the "modification" involved a prohibited rethinking of the situation which existed at the time the original decree was entered. Fifth, the district court lacked the power to enter the Judgment without a trial on the merits or even a plenary evidentiary hearing.

In addition, as also shown below, the district court's stated reasons for granting the "modification" motion were legally insufficient.

a. The Judgment below cannot be justified as a "modification" of prior consent decrees since, without a trial or evidentiary hearing, it imposed substantial restraints upon the Examiners going well beyond those agreed to in the prior decrees

Despite extensive research, we have found no case where one party, seeking not to lessen the burdens on itself but to impose new restraints on another, was successful in having a consent decree substantially changed without the agreement of all the parties.

The Supreme Court's decision in *Ford Motor Co.* v. *United States,* 335 U.S. 303 (1948), demonstrates that such an alteration of a consent decree is impermissible. There, the Government had instituted separate antitrust actions against Ford and the other leading automobile manufacturers. Ford consented to the entry of a decree which con-

tained various prohibitions, one of which would expire if the Government did not obtain a similar restriction in litigation against General Motors by a specified date. The Government, after having previously obtained prior extensions of the deadline, sought yet another postponement and the district court granted that motion. The Supreme Court reversed, holding that any further extension of time would amount to a substantial change of the consent decree which was prohibited:

> "If the Government seeks to outlaw possible arrangements by Ford with a finance corporation, *it must establish its case in court against Ford as against General Motors and not draw on a consent which by its very terms is not available.*" 335 U.S. at 322. (Emphasis added).

Since the modification of the consent decree rejected in *Ford* was minor compared to that granted below, *Ford* alone requires that the Judgment below should be reversed. Moreover, two well-established principles of law pertaining to consent decrees also mandate reversal of the Judgment below.

First, consent decrees cannot be modified to impose new restrictions unless all parties agree to such a change. *See Butler* v. *Denton,* 57 F. Supp. 656 (E.D. Okla. 1944), *aff'd,* 150 F.2d 687 (10th Cir. 1945); *Steingruber* v. *Johnson,* 35 F. Supp. 662 (M.D. Tenn. 1940). In *Steingruber,* plaintiffs instituted a patent infringement suit which was settled by a consent decree declaring that the plaintiffs' patent was valid and that it had been infringed, but containing no injunctive provisions. Thereafter, plaintiffs moved for an injunction

against future infringement of the patent. In denying the motion, the court held that it was "powerless" to grant such relief since

> ". . . a consent judgment cannot be amended, modified, or corrected in any essential particular except with the consent of all parties thereto." 35 F. Supp. at 663.

Second, it is not proper to modify a consent decree which rewrites or changes an integral part of the parties' agreement.* *See United States* v. *Savannah Cotton & Naval Stores Exchange, Inc.*, 192 F. Supp. 256 (S.D. Ga. 1960), *aff'd sub nom. Turpentine & Rosin Factors, Inc.* v. *United States*, 365 U.S. 298 (1961) (*per curiam*); *United States* v. *Shubert*, 163 F. Supp. 123 (S.D.N.Y. 1958) (Kaufman, J.). For example, in *Savannah Cotton*, the defendant sought a modification of a consent decree to delete a provision requiring it to disclose information relating to its sales and purchases. The court refused, stressing that a deletion of the reporting requirements

> ". . . would go to the very heart of the prohibitions that were consented to in the judgment and would, in effect, virtually nullify a great portion of it." 192 F. Supp. at 258-259.

In the above cases, the courts refused to rewrite the consent decrees where the movant was seeking only to lessen the burdens of the decree on itself. *A fortiori*, the motion to "modify" below should have been denied since it imposed new restraints on the Examiners. It rewrote the

* A limited exception to this rule has been created where a party seeking to lessen the restrictions of a decree on itself makes a sufficient showing of unforeseen changed circumstances which have created oppressive hardship and grievous wrong. *See* part A(1)(b) of this Point II below.

prior decrees to delete the Permanent Plan and prohibit the Examiners from using any means of selection and licensing other than the Revised Plan.*

b. The movants did not and could not satisfy the stringent requirements for any modification of a consent decree

Not only did the so-called "modification" impose substantial new restraints on the Board of Examiners, without any justification, but also the stringent requirements for *any* modification of a consent decree were not satisfied.

Those stringent requirements were enunciated in the leading case of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) (*"Swift I"*), where the Supreme Court rejected an attempt to modify a consent decree entered in an antitrust action brought against leading companies in the meat packing industry. The decree enjoined defendants from distributing groceries at wholesale. Ten years after it was entered, defendants moved to modify to delete that restric-

* The impropriety of "modifying" a consent decree to impose substantial new restrictions on a party is also demonstrated by reference to the rules governing a court's review of a settlement. Such a court is to determine only whether the agreement is equitable; is ". . . powerless to rewrite the provisions of the settlement agreement"; and its only alternatives are to approve the settlement or set it aside and permit the parties to go to trial. *See United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (U.S. Apr. 19, 1976); *Patterson* v. *Newspaper & Mail Delivery Union*, 514 F.2d 767, 770-772 (2nd Cir. 1975) (Mansfield, J.), *cert. denied*, 44 U.S.L.W. 3756 (U.S. June 30, 1976). The district court in the instant case was bound by these principles in 1973 and 1975 when it approved the prior consent decrees. It would certainly be anomalous if, by the mere passage of time, the lower court judge to whom this case was recently reassigned somehow gained the power to rewrite decrees approved by other district court judges in order to add additional restrictions on the Board of Examiners.

tion, claiming that changes in the industry structure rendered the decree useless and caused movants to suffer substantial financial losses. Associations of wholesale grocers intervened to oppose the motion, but the district court granted it. On appeal, the Supreme Court reversed, holding that the decree could not be modified.

The Court (per Mr. Justice Cardozo) reviewed the prior proceedings in that case and concluded that, as here, the movants had consented to the decree "with their eyes open":

> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open." 286 U.S. at 115.

Then, in oft-quoted language, the Court laid down the governing principles on a motion to modify a consent judgment:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering *hardship so extreme and unexpected* as to justify us in saying that they are the *victims of oppression. Nothing less than a clear showing*

of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 U.S. at 119 (Emphasis added).

Thus, under *Swift I*, a consent judgment cannot be modified except in the rare instance where (1) there is a clear showing of (2) substantially new circumstances which (3) were unforeseen at the time the decree was entered and which (4) would create oppressive hardship and grievous wrong.* These principles have been uniformly applied since *Swift I* to deny motions to modify consent decrees. *See e.g., SEC* v. *Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304 (10th Cir. 1970); *SEC* v. *[illegible] dynamics, Inc.*, 319 F. Supp. 1380 (D. Colo. 1970), *aff'd*, 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *SEC* v. *LeBrock*, 245 F. Supp. 799 (S.D.N.Y. 1965) (Wyatt, J.); *United States* v. *Lucky Lager Brewing Company*, 209 F. Supp. 665 (D. Utah 1962); *United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (*per curiam*) ("*Swift II*"); *United States* v. *Savannah Cotton & Naval Stores Exchange, Inc., supra; United States* v. *Owens-Corning Fiberglas Corp.*, 178 F. Supp. 325 (N.D. Ohio 1959); *United States* v. *Shubert, supra.*

As shown below, the Board of Education and Chancellor did not and could not make a sufficient showing to permit a "modification" here. Each of their justifications for the motion to "modify" was lacking in both factual and legal support.

---

* The party seeking a modification of a consent decree has the burden of proving that such relief should be granted. *See e.g., Wirtz* v. *Graham Transfer & Storage Co.*, 322 F.2d 650 (5th Cir. 1963); *United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (*per curiam*).

(i) The prototype job analyses

The first justification for the motion to "modify" was that the three prototype job analyses prepared by the consulting firm of American Institutes for Research ("AIR") pursuant to the Permanent Plan were inadequate. The Board of Education and Chancellor claimed that, as a consequence, the requirement for such analyses should be deleted (I-593-596a). Even assuming *arguendo* that those analyses were inadequate,* such a conclusion does not follow (I-679-688a).

First, every testing expert (including plaintiffs' own expert in this very case) and every court which has considered the question has concluded that the proper course in developing job-related examinations is first to prepare a proper job analysis (I-681-683a). The EEOC Guidelines on Employee Selection Procedures are in accord and so are plaintiffs' counsel in this case (I-654a, 681-683a).** Thus, if there are to be job-related examinations for supervisory positions in the future, job analyses must be prepared. If the AIR analyses were inadequate, the defects in those analyses should have been remedied, if possible, or those analyses should have been redone properly. Such a task certainly did not give rise to any grievous wrong or hardship or otherwise justify a "modification" of the consent decree to delete the job analyses requirement.

---

* There was a substantial body of opinion—including five of the six advisory reviewers selected by the Board of Education pursuant to the Permanent Plan, as well as Development Dimensions Inc., the independent testing consultants who were retained to prepare the prototype examinations—which believed that the AIR analyses were adequate (I-516-517a, 684-686a, 712-725a).

** *See* part A.3 of this point below at pp. 70-73.

Second, the Board of Education and the Chancellor had known, at least since May 1974 when they agreed to the Permanent Plan, that it would be necessary to develop proper job analyses.* Thus, the necessity of preparing proper job analyses cannot be deemed unforeseen.

Third, the cost of preparing even entirely new prototype job analyses should not exceed the $36,699 paid to AIR by the Board of Education (I-594a, 684a), and future analyses, when needed, were to be done, no doubt, at substantially less cost by in-house employees of the Board of Education (I-517a, 680-681a, 693a). In light of the $2.25 billion total budget of the New York City schools, these expenditures are not significant and thus no oppression can be claimed by the Board of Education (I-684a, 692a).

(ii) The City's current financial situation

The second justification for the "modification" motion was that New York City's present financial straits had caused budget cutbacks in the Board of Education and that, in the Board of Education's view, money to be spent implementing the Permanent Plan would better be spent in other ways (I-593-594a, 596-597a). This justification is equally without merit (I-688-695a).

First, underlying the Board of Examiners' responsibilities under the Permanent Plan were the requirements of New York State's Constitution and Education Law.** In essence, then, the "modification" motion sought the entry of an order by this Court suspending the operations of New York law, and the court below, in granting that mo-

* In fact, the Board of Education itself wished to be responsible for job analyses under the Permanent Plan (I-705-706a, 784-785a).

** *See* part A.2 of this point below at pp. 58-68.

tion, did just that. Obviously, a temporary period of fiscal stringency cannot justify entry of such an order.

Second, the City's financial crisis was not new and it was not unforeseen. We did not have the benefit of discovery proceedings on the issue of what the Board of Education knew and when it knew it. Nor did the district court make any findings on this matter. However, from what had been publicly reported in the press, it was quite clear that during 1974 and early 1975 it was already *publicly* known that New York City was in a major financial crisis which already had impinged upon the Board of Education's budget (I-689-691a, 727-746a). When all the parties moved in December 1974 and January 1975 to have this Court approve the Permanent Plan and incorporate it as part of the Consent Judgment, the City's financial crisis was already quite severe (I-689-691a, 727-746a). Under these circumstances, the alleged financial hardship upon which the Board of Education relied was not unforeseen or unexpected and did not even represent a substantial changed circumstance.

Third, the Board of Education did not contend or attempt to show that its compliance with the prior consent decrees was *then causing* severe hardship. *Swift I* and its progeny require a showing that movants are "suffering" severe hardship and grievous wrong because of their current compliance with the decree such that they can be deemed "victims of oppression" by a decree which is now, through changed circumstances, "an instrument of wrong." 286 U.S. at 114-115, 119.

Fourth, the Board of Education did not even show that failure to modify the Consent Judgment *might* cause op-

pressive hardship and grievous wrong in the future. At most, the Board showed that compliance would cause it to expend funds. But the Permanent Plan was quite flexible and did not require an expensive examination program* (I-520-522a, 674a, 692-693a); the Board of Education was already obligated by contracts to pay for the services of the two independent consulting firms which were to develop prototype job analyses and examinations (I-680-681a, 692a); and the "modifications" sought and granted below will themselves require expenditures of public funds, and will not be consistent with the requirements of New York law (I-672-679a). Further, even if there were no *Chance* case and no Consent Judgment, compliance with New York State's constitutional and statutory scheme for objective supervisory examinations administered by the Board of Examiners would still require an expenditure of funds.

Fifth, it is always to be expected that compliance with a judgment may cause financial detriment. In nearly every case in which a party is required by a judgment to do or not to do an act, compliance may be costly, but this has been rejected as a basis for modification. *See Swift I*, *SEC* v. *Jan-Dal Oil & Gas, Inc.*, *SEC* v. *Thermodynamics, Inc.*, and *United States* v. *Shubert*.**

---

* Not only was the Permanent Plan quite flexible—it would have permitted the Board of Examiners or its consultants to select from a variety of examination techniques in creating a particular supervisory examination (I-520-522a)—but the Board of Examiners had repeatedly indicated its willingness to cooperate with the Board of Education in order to implement that Plan in a fiscally realistic manner (I-694a).

** Thus, in denying an attempt to modify, the court in *Thermodynamics* stated:

> "It must be recognized that some untoward consequences are the inevitable result of most injunctions. That is all the defendant has been able to show, and we think it insufficient under *Swift*." 319 F. Supp. at 1384.

(iii) The personnel requirements in the City's schools

The third alleged justification for the motion to "modify"* was that there were then few vacancies for supervisors; that, as a consequence, there might not be an *immediate* need for new supervisors to be examined in certain positions; and, thus, that to continue to require compliance with the Consent Judgment would give rise to unnecessary cost (I-594a, 597-598a). This justification was also baseless (I-695-697a).

First, all that the Permanent Plan initially required was the preparation of three prototype job analyses and Step 1 examinations (I-518-519a, 534a, 695a). The Board of Education was already obligated to pay for the services of two consulting firms to prepare those prototypes (I-680-681a, 692a). Thus, compliance with the Consent Judgment was not causing any grievous wrong or hardship at the time of the proceedings below.

Second, there were vacancies in certain supervisory positions at the time of the proceedings below, including in the position of principal of elementary schools which was one of the prototypical positions for which job analyses and examinations would have had to have been prepared initially (I-696a).

Third, even assuming *arguendo* that there were no vacancies at the time of the proceedings below, it was obvious that there would be vacancies at some point in the future. After all, there were about 4000 supervisors in the

* The fourth justification advanced by the Board of Education below is not relevant on this appeal since it related exclusively to that portion of the motion to "modify" which the court below denied.

New York City schools and many were at or near retirement age (I-696-697a). Even the Board of Education did not deny that vacancies would exist in the future.

The requirement of objective supervisory examinations prepared and administered by the Board of Examiners has been part of New York law for many years (I-689a). *See* 458 F.2d 1167, 1170 (2nd Cir. 1972). The Board of Examiners has complied with it in all seasons, whether the economy was booming or was in the depths of the Great Depression, and whether there were numerous vacancies or not (I-689a). The Permanent Plan encompassed flexible guidelines for the creation and implementation of supervisory examinations not merely now, but also in the future. Thus, a temporary situation of few or no vacancies in supervisory positions is far from the kind of situation necessary to permit modification of the Consent Judgment.

Fourth, since there have been excess numbers of licensed supervisors without positions in the past (I-697a), and since the City's financial plight—which gave rise to the alleged shortage of vacancies—was known in 1974 and early 1975 (I-689-691a, 697a, 727-746a), the fact that there were few vacancies at the time of the proceedings below cannot be deemed unforeseen.

c. Under the circumstances, the district court should have restricted any judicial relief to that which would have preserved the parties' agreement in the Consent Judgment

Since the Board of Education and Chancellor failed to satisfy the stringent requirements for modification of a consent decree, the entry of the Judgment below was error because it did not preserve the agreement of the parties.

Absent a sufficient showing of unforeseen changed circumstances creating oppressive hardship, a court lacks the power to grant any judicial relief under a consent decree other than to preserve and carry out the parties' agreement. For that agreement embodies the "conditions" upon which the parties to the consent decree "waived" their due process right to a full trial. *See United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971). *See also United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes* v. *United States*, 342 U.S. 353 (1952); *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

Thus, in *Armour*, the Supreme Court refused to enjoin an acquisition where a consent decree did not explicitly forbid it. In so holding, the Court rejected the contention that the decree should be applied to satisfy the plaintiffs' purposes:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its

> four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given the waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." 402 U.S. 681-682. (Footnote omitted; emphasis in original.)

Since the Judgment below imposes substantial new restraints on the Examiners, it was erroneous because it failed to preserve the parties' agreement. In addition, the decision below was in error for other related reasons. First, it is based on the view that an unwritten aim of the parties to the Consent Judgment was, or should have been, the attainment of "its underlying objectives . . . by simpler, more practical means. . . ." (I-930a). Such a provision is not specified in the decree, and if the parties had agreed, they "could have chosen language that would have established" that intention. *Armour,* 402 U.S. at 679. Judge Pollack improperly read such a purpose into the Consent Judgment in violation of *Armour's* proscription against such judicial intervention.

Second, by granting the "modification" motion, the court below disregarded the "conditions upon which" the Board of Examiners had waived its "due process" right to fully litigate this case. *See Armour,* 402 U.S. at 681-682.

d. The "modification" involved a prohibited rethinking of the situation which existed when the original decree was entered

It is well established that a modification of a consent decree must not be the result of rethinking the situation as it stood at the time the original decree was agreed upon by the parties and approved by the court. *See e.g., Swift I, supra; United States* v. *Lucky Lager Brewing Co., supra; Swift II, supra.*

Thus, in *Swift I*, the Supreme Court refused to modify an antitrust consent decree to delete a provision enjoining defendants from distributing groceries at wholesale. In so holding, the Court stated:

> "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting." 286 U.S. at 119.

In *Swift II*, in denying a second attempt to modify the same consent decree, the district court stressed that it was

> ". . . not at liberty to substitute its judgment upon the question whether the injunction as entered in 1920 was in accord with equitable principles under the circumstances then prevailing.
>
> * * *
>
> It bears repeating . . . that the test is not whether this court would issue the existing decree as an original matter under the circumstances which obtain today. The decree is above impeachment, and if present-day conditions are substantially the same as conditions in 1920, to modify would be to reverse.
>
> * * *

> . . . unless the solemn judicial act taken upon the considered consent of all the parties is to be stultified, the decree must enjoy a solid presumption that it was founded on fact and supported by reason." 189 F. Supp. 904, 906.

Similarly, in rejecting an attempt to modify an antitrust consent decree, *Lucky Lager* held:

> ". . . general reasons why the consent decree should not have been consented to in the first place . . . can be given no determinative effect. . . .
>
> * * *
>
> *The court at this stage of the proceeding has no plenary power to frame a decree* which in the judgment of the respected economist who supports the defendant's motion, or of the Chamber of Commerce which also persuasively supports its position, or in its own judgment would be designed best to promote local industry or an improved competitive situation generally. . . . Certainly, if such plenary power now existed the court should consider other views also including those of the other organizations in competition with Lucky Lager. No such general investigative responsibility or power is now at the disposal of the court by reason of the limited issues raised by a motion to modify a consent decree and for other reasons." 209 F. Supp. at 669-670 (Emphasis added).

Yet, all of the justifications proffered by the Board of Education and the Chancellor to support their "modification" motion could have been raised by them before the

March 25, 1975 Order was entered.* Furthermore, in entering the Judgment below, the district court clearly indicated that it was doing so for reasons condemned by this principle. Judge Pollack's decision expressly stated that he disagreed with the propriety and effectiveness of the Permanent Plan under the circumstances prevailing at the time of its inception (I-930a). Thus, Judge Pollack granted the "modification" motion below because he believed that the Permanent Plan should not have been approved and incorporated as part of the Consent Judgment originally by Judge Tyler as the means for developing non-discriminatory examinations. Such reasoning clearly runs afoul of the principle described above.

e. The district court lacked the power to enter the Judgment in the absence of a trial on the merits or a full evidentiary hearing

The federal courts have consistently held that *any* modification of a consent decree must be preceded by a trial on the merits, or at the very least, a full evidentiary hearing following an opportunity to engage in discovery pro-

* If the Board of Education and the Chancellor had doubts about the Permanent Plan, they should have raised their objections before the March 25, 1975 Order was entered. Instead, they agreed to the Permanent Plan and agreed to be bound by the Consent Judgment (I-126-155a, 307-308a, 504a). The court below should have barred them from raising objections to the Permanent Plan which they could have raised originally because ". . . a consent judgment does have res judicata effect." *Siegel* v. *National Periodical Publications, Inc.*, 508 F.2d 909, 913 (2nd Cir. 1974) (Mulligan, J.). *See also Wallace Clark & Co.* v. *Acheson Industries, Inc.*, 532 F.2d 846 (2nd Cir. 1976) (Smith, J.); and *SEC* v. *Thermodynamics, Inc.*, 319 F. Supp. 1380 (D. Colo. 1970), *aff'd.* 464 F.2d 457 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). Moreover, Professor Moore agrees that a ". . . consent judgment, whether at law or in equity, has . . . res judicata effect." *See* 1B J. Moore's FEDERAL PRACTICE §0.409[5], at 1032 (2d ed. 1974).

ceedings. *See United States* v. *Armour & Co.*, 402 U.S. at 681; *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes* v. *United States*, 342 U.S. 353, 357-358 (1952); *Swift II*, *supra*.

Thus, in *Hughes*, the Supreme Court rejected the Government's attempt to expand the restrictions set forth in an antitrust consent decree. The decree provided that the defendant could either sell his stock in a company, *or* deposit such stock with a trustee under a voting trust agreement. The defendant chose the latter alternative, but the Government subsequently sought, and the district court granted, an order requiring the trustee to sell the stock. The Supreme Court reversed, stating:

> "We entertain no doubt concerning the District Court's power to require sale of Hughes' stock after a proper hearing . . . *But there has been no adequate hearing of this issue as to Hughes.* Neither when the present order was considered nor when the original decree was entered were any *findings of fact* made to support an order of compulsory sale of Hughes' stock . . . At every stage Hughes objected to the order forcing sale of his stock *without a hearing that included evidence and a judicial determination based on it.*" 342 U.S. 357-358 (Emphasis added).

One of the legal underpinnings of this procedural requirement of a trial or evidentiary hearing is mandated by the constitutional requirement that a party has "a right guaranteed to him by the Due Process Clause" to "litigate the issues raised" in a lawsuit. *United States* v. *Armour*, 402 U.S. at 682. In *Armour* the Court held that a party to a consent decree retains that right in any subsequent proceeding to modify the decree.

Under the circumstances presented below the trial or hearing required under the Due Process Clause should have included an opportunity to present evidence with respect to disputed factual issues. *See Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972); *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *In re George W. Myers Co.*, 412 F.2d 785, 786 (3rd Cir. 1969); *Weyenberg* v. *Menasha*, 401 F. Supp. 801, 803 (E.D. Wis. 1975).*

---

* Even in the context of *preliminary* injunction motions, where there are disputed issues of fact, the federal courts have reversed such orders having improperly placed restraints on an unwilling party, without first affording the latter either a trial on the merits or a full evidentiary hearing. *See e.g., Dopp* v. *Franklin National Bank*, 461 F.2d 873 (2nd Cir. 1972) (Kaufman, J.); *SEC* v. *Frank*, 388 F.2d 486 (2nd Cir. 1968) (Friendly, J.); *Carpenters' District Council* v. *Cicci*, 261 F.2d 5 (6th Cir. 1958); *Hawkins* v. *Board of Control*, 253 F.2d 752 (5th Cir. 1958); *Sims* v. *Greene*, 161 F.2d 87 (3rd Cir. 1947). Thus, in *Dopp*, this Court reversed the entry of a preliminary injunction based on a paper record of affidavits and depositions. In so holding, Judge Kaufman stated that:

> "Generally, of course, a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper to another.' Sims v. Green, 161 F.2d 87, 88 (3d Cir. 1947). This is particularly so when the judge, without holding an evidentiary hearing, resolves the bitterly disputed facts in favor of the party who has the burden of establishing his right to preliminary relief. *See, id.;* 7 Moore, Federal Practice §65.04[3]. This caveat is most compelling 'where everything turns on what happened and that is in sharp dispute; in such instances, the inappropriateness of proceeding on affidavits attains its maximum . . .' Securities and Exchange Comm'n v. Frank, 388 F.2d 486, 491 (2d 1968) (Friendly, C.J.)." 461 F.2d at 879.

This Circuit has similarly required a trial or evidentiary hearing in other situations where disputed factual issues are present. Thus, this Court has repeatedly reversed the granting of summary judgment because of the existence of factual issues, and has noted that such a motion is "particularly" inappropriate where the nonmovant, as here, has not yet had an opportunity to engage in pretrial discovery proceedings. *See e.g., National Life Ins. Co.* v. *Solomon*, 529 F.2d 59, 61 (2nd Cir. 1975) (*per curiam*). It has also held that a full trial or hearing is required before substantial sanctions may be imposed under Fed. R. Civ. P. 37 for discovery defaults. *See Fla.* v. *Koegel*, 504 F.2d 702 (2nd Cir. 1974) (Mulligan, J.).

Since the Examiners are now restricted to the terms of the Revised Plan and enjoined from implementing the Permanent Plan or any other method of selection and licensing of supervisors, the [illegible] Judgment below without a trial or evidentiary hearing, without findings of fact, and in the face of a conflicting paper record with regard to the alleged need for "modification," should be reversed.

f. The district court's stated reasons for granting the "modification" were legally insufficient

The district court held that it had the power to "modify" because, in its view, the Revised Plan could achieve the objectives of the Consent Judgment by "simpler, more practical means," and because the Permanent Plan "might" not succeed in eliminating the conditions that initially gave rise to this litigation (I-930a). These reasons for granting the "modification" are wrong, irrelevant and legally insufficient.

First, the district court improperly relieved the Board of Education and Chancellor of their burden of proving that the stringent requirements for modification of consent decrees were satisfied. The district court's offhand analysis was not based on the existence of *any* changed circumstances and their detrimental effect on the Board of Education and Chancellor.

Second, the district court asserted that it had the power to change, in a fundamental manner, an agreed upon plan which the parties themselves—and not a court—had fashioned, and to change it in a manner which substantially increased the restraints upon a party to that agreement. The court had no such power.

Finally, the district court assumed, again without any legal support, that a consent decree could be substantially changed to simplify it.*

* As authority for its decision, the district court improperly relied on *System Federation* v. *Wright*, 364 U.S. 642 (1961) and *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942), neither of which is apposite. While *Wright* modified a consent decree, it did so at the request of a defendant to relieve it of restrictions on its own conduct because of a change in the underlying Railway Labor Act. The Court felt bound by *Swift I*'s requirement that the changed circumstances necessary for modification be such as to turn the decree into "an instrument of wrong" (364 U.S. at 647), but held that the change in that statute was substantial enough to satisfy the requirement. As we demonstrated above in Point I, *Wright* is the leading case on modification of a consent decree due to a change of law. It is, thus, wholly inapplicable with respect to the motion to "modify" below since the New York State constitutional and statutory framework under which the Board of Examiners functions has not been changed in any fashion.

Chrysler is equally inapposite. While the Court there affirmed a modification of a consent decree, it did so only to effectuate a very minor change in the decree. The Government's action against Chrysler was a parallel suit to the antitrust action in *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948), discussed above. As in the *Ford* case, Chrysler agreed to a consent decree containing a number of prohibitions; and in order ". . . to protect Chrysler from being placed at a competitive disadvantage . . ." (316 U.S. at 563), one of the prohibitions would expire if the Government did not obtain a similar restriction against General Motors by a certain date. Due to unexpected delays in the General Motors litigation, the Government moved for an extension of this deadline. While the Court granted the Government's request, it stressed that the General Motors case had been delayed for reasons for ". . . which the Government was not responsible" and that "Chrysler [had] made no showing . . ." that it was suffering a competitive disadvantage, the Second World War having ". . . minimized the significance of the competitive factor." 316 U.S. at 563-564. In light of the Supreme Court's subsequent decision in the *Ford Motor* case, *Chrysler* must be read most narrowly. In *Ford*, the Supreme Court reversed the granting of a further extension of a parallel deadline on the ground that such an extension would amount to a prohibited major change in the consent decree. The Supreme Court also stressed in *Ford* that the provision in question was intended to minimize competitive disadvantage and that, at the time of the *Chrysler* decision, non-competitive wartime circumstances prevailed. 335 U.S. at 321-322.

Reading *Chrysler* and *Ford* together, one must conclude that the "modification" entered below was not a justifiable minor change in the consent decree to preserve the essence of the parties' agreement as in *Chrysler*, but was a substantial alteration of the decree prohibited by *Ford*.

2. *The "modification" vitiates New York State's constitutional and statutory scheme for selection and licensing of supervisory personnel in the New York City schools*

New York State's Constitution (art. 5, §6) requires that all civil service appointments shall be made by objective examinations to determine "merit and fitness". The New York State Education Law §§2569(1)(a), 2590-j(3)(a)(1), (b)(2) and (3), and 2573(2), further mandate that the Board of Examiners shall have *exclusive control* over determinations of whether candidates for licensure for supervisory positions in the New York City school system possess sufficient merit and fitness to perform the duties required in that position; that the Board of Examiners shall have *exclusive control* over the preparation and administration of examinations to aid in making that determination; that such examinations must be "objective"; that a candidate must, in addition to passing an examination, comply with minimum education and experience requirements promulgated by the Chancellor; and that licensure must precede appointment to such a position, *i.e.*, that no person may serve in a permanent appointment as a supervisor without first being licensed as a result of the mandated examination and other procedures.*

Recently, in *Board of Education* v. *Nyquist*, 31 N.Y.2d 468, 341 N.Y.S.2d 441 (1973), the New York Court of Appeals reaffirmed the importance of this constitutional and

* The relevant provisions of New York's Constitution and its Education Law are set forth in Addendum A hereto. *See* generally the decisions on plaintiffs' preliminary injunction motion in this case, 330 F. Supp. 203, 207 (S.D.N.Y. 1971) and 458 F.2d 1167, 1170 (2nd Cir. 1972).

statutory scheme. There, the State Commissioner of Education had determined that a person who had satisfactorily served as an "acting" principal for 11 years should be given a permanent appointment as principal even though she had not passed the Board of Examiners' objective examinations required for licensing as a principal. The Appellate Division of the State Supreme Court struck down the Commissioner's determination and, in an opinion by Chief Judge Fuld, the New York Court of Appeals affirmed. It held that New York's Constitution and statutes require that a person must pass the prescribed examination before receiving a license:

> "The constitutional mandate that appointments to civil service positions be based on merit and fitness, to be ascertained by competitive examination where 'practicable,' may not be blinked or avoided.* *A civil servant may not, therefore, be appointed without the required examination to a higher position than his license or title calls for simply upon the basis of his satisfactory performance during temporary or 'out-of-title' service in such higher position.* [Citations omitted]. It has been well said in the Bacon case (per Matthew M. Levy, J.) that (205 Misc., at p. 79),

---

* *Nyquist* was not the first instance where the New York courts reaffirmed New York's public policy that civil service appointments be determined according to the strict "merit and fitness" standards enunciated in the Constitution. Thus, *e.g.*, in *Palmer* v. *Board of Education*, 276 N.Y. 222, 226, 11 N.E.2d 887, 888 (1937), the Court of Appeals held:

> "By placing this provision in the Constitution the People of the State have declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service, and have thus formulated and announced the public policy of the State. No administrative officer may violate the provisions of the Constitution, and no court may sanction a violation."

> 'If the beneficent merit system with competitive examinations is to be preserved, *we must adhere strictly to the rule that only one who has passed the prescribed appropriate examination is entitled to a certificate of appointment* * * * To rule otherwise would be tantamount to appointing unqualified persons, in the sense that they had not passed the required competitive examinations or had not received certificates of appointment as required by law. And not alone might incompetence be thus permitted, but favoritism or discrimination might thus be enabled to raise its ugly head.' ''

31 N.Y.2d at 472-473; 341 N.Y.S.2d at 445. (Emphasis added)

Not only does the Judgment entered below contravene and change each of the requirements of New York law referred to above, and run afoul of *Nyquist*, but that Judgment also violates fundamental concepts of federalism.

a. The Judgment entered below contravenes New York's constitutional and statutory scheme in numerous ways

Although the Judgment entered below violates New York law in numerous different ways, those violations can be separated into two categories: first, that the Judgment by its very nature interferes with the Examiners' *exclusive control* of determinations of fitness and selection of means to aid them in making such determinations; and second, that the method of selection and licensing set forth in the "Revised Plan" violates the requirements of New York law.

The Judgment entered below requires the Board of Examiners to administer the Revised Plan for the selection

and licensing of supervisors developed by the Board of Education, the Chancellor and plaintiffs and prohibits the Examiners from preparing or administering any other means or methods of selection and/or licensing supervisors. But, Sections 2569(1)(a) and 2590-j(3)(a)(1) of the Education Law clearly mandate that the Board of Examiners has exclusive control over the examination process to determine "merit and fitness", including, as part of its obligation to prepare and administer examinations, the exclusive right to choose examination procedures, to set passing grades and to rate answers.*

Over 50 years ago, the New York State Education Commissioner rendered two determinations which make clear that the Education Law confers this exclusive control on the Board of Examiners and that it is to be exercised without interference by either the Board of Education or the Chancellor (formerly known as the Superintendent of Schools).

Thus, *In the Matter of the Jurisdiction of the Board of Examiners of the City School District of New York*, 25 State Department Reports 275 (Education Department, February 9, 1921) (hereinafter the "Jurisdiction Case"), the Education Commissioner, in interpreting the statutory language which is presently set forth in Education Law §2569, held:

> "It was the obvious purpose of this section to confer upon the board of examiners the power and duty of

* In light of this requirement of New York law, the district court had previously held in this case that the power to prescribe and conduct supervisory examinations ". . . is vested solely in the defendant Board of Examiners. See N.Y. Educ. Law §2590-j3(a)(1)." (I-301a-2, 303a). That determination, clearly correct, is the law of this case and should have been followed by the court below. *See Zdanok* v. *Glidden Company*, 327 F.2d 944, 952-953 (2nd Cir.), *cert. denied*, 377 U.S. 934 (1964).

examining applicants for teachers' licenses. Such power may not be exercised nor may such duty be performed without giving to the board of examiners *entire control over the examination of applicants, which includes the preparation of questions, the rating of answers and such other investigation as may be necessary to ascertain the fitness of applicants* for licenses. As to these matters the power of the board of examiners may be exercised *exclusive of control by the board of education and the superintendent of schools.* There may not be, by regulation of the board of education or by the exercise of the supervisory power conferred upon the superintendent, any interference with the determination of the fitness of applicants who are required to be licensed as teachers. This determination must under the statute be made by the board of examiners through examinations conducted by such board." (At 280-281) (Emphasis added.)

Similarly, *In the Matter of the Investigation of the Board of Examiners of the City of New York by the President of the Board of Education* (N.Y.S. Education Department, January 23, 1926) (hereinafter the "Investigation Case"),* the Education Commissioner rendered a memorandum decision holding:

> *"Neither the Board of Education nor the Superintendent of Schools may by any official action deprive the Board of Examiners of the powers conferred upon it by statute as to such examinations, or interfere with the duties imposed upon the board pertaining to the determination of the fitness of candidates for teaching positions or the preparation of eligible lists.*
>
> It is the intent of the statute that the Board of Examiners should possess and exercise an *exclusive*

* Since this determination is not readily accessible, its full text is set forth in Addendum B to this brief.

power in the making of the tests and examinations which are required for the purpose of determining the qualifications of teachers. It would be contrary to the express language and the evident spirit of the statute to permit any other administrative agency to assume any responsibility or exercise any control in respect to the determination of the fitness of candidates for teaching positions." (At p. 3)

* * *

"The board [of examiners] itself has control over its procedure in determining what questions shall be asked and the weights that shall be given to such questions." (At p. 5)

* * *

"The Superintendent may *not* direct the Board of Examiners to institute any system of correcting the papers. The matter of examining and correcting papers is within the exclusive control of the Board of Examiners." (At p. 5)

* * *

"Inquiry is . . . made as to the power of the Board of Examiners to institute examinations of a particular nature to determine the qualifications of candidates for licenses, without consulting the Superintendent of Schools or without obtaining his approval therefor before the examination is held. . . . *The determination of the fitness of the candidates is within the control of the Board of Examiners. The Superintendent may not control the board in its application of the tests or the conduct of examinations for the purpose of ascertaining such fitness.* The Board of Examiners is therefore not required to consult the Superintendent of Schools as to the nature of the examinations and tests to be applied. . . .

The inquiry is as to the power of the Board of Education to control the extent of written examinations required of graduates of training schools and the ap-

plicants for license No. 1. In my opinion the Board of Education or the Superintendent of Schools may not direct the Board of Examiners to eliminate or reduce the extent materially of the written examinations required of such graduates. This matter is one that must *necessarily fall within the exclusive control of the Board of Examiners.*" (At p. 7)

* * *

"It is for the board to determine as to the relative values and weights of the various parts of the examinations and of the credit which shall be given on account of prior service and experience." (At p. 7) (Emphasis added.)

More recently, in *Board of Education* v. *Nyquist, supra,* New York's highest court reaffirmed the principle that no other agency may interfere with the Board of Examiners' functions. *Nyquist* held that even the New York State Education Commissioner may not interfere with the Board of Examiners' exercise of their statutorily mandated functions; and the Commissioner's own determinations years ago in the Jurisdiction Case and the Investigation Case show that neither may the Board of Education nor the Chancellor interfere. *A fortiori,* plaintiffs—who are, at best, candidates for future supervisory examinations—can have no legal right to impose their nonprofessional views upon the Board of Examiners or to limit the Examiners' discretion in exercising their functions in selecting from among various available means to determine the fitness of candidates for supervisory positions.

Because of the Education Law's obvious commands, even the Board of Education's own By-Laws recognize that the Examiners have exclusive control over the preparation

and administration of supervisory examinations. Thus, Section 67 of those By-Laws not only describes the Examiners' duty "to hold examinations", "to examine" and "to prepare all necessary eligible lists",* but it expressly enjoins that:

> "4. *Except as to matters over which specific jurisdiction is given to the Board of Examiners by the Education Law*, examiners shall be subject to the direction and supervision of the Superintendent of Schools." (Emphasis added.)

In short, the Judgment entered below violates New York law in a most fundamental fashion by requiring the Board of Examiners, the statutory testing agency, to administer a plan for selecting and licensing supervisors created by others (*i.e.*, agencies which may require new supervisors in the future and candidates for such positions) and by prohibiting the Examiners from administering any other means of selection and/or licensing. For this reason alone, and without regard to the specific contents of the Revised Plan, the Judgment below should be reversed.

Furthermore, the Judgment entered below should be reversed because the Revised Plan requires administration of a means of selection and licensing which is not only anathema to the Examiners, but is violative of the commands of New York law in many additional ways, *viz.*:

---

* Section 67(2) of the Board of Education's own By-Laws provides:

> "It shall be the duty of the Board of Examiners to hold examinations for licenses established in these By-Laws on such dates as may be designated by the Superintendent of Schools, to examine all applicants who are required to be licensed or to have their names placed on eligible lists for appointment in the schools of the city, and to prepare all necessary eligible lists."

1. The Judgment permanently suspends the statutory requirement that no person may be licensed as a supervisor without first passing an examination prepared and administered by the Board of Examiners and being otherwise deemed fit by the Examiners. The Revised Plan does away with this essential requirement of New York law since it provides for "provisional licensure"—and thus eligibility for appointment—of *any* candidate whose transcript and resume evidence compliance with the minimum education and experience requirements promulgated by the Chancellor pursuant to Education Law §2590-j(2)* (I-583-585a, 669-677a).

2. The Judgment limits the Examiners' discretion in choosing the examination and investigative techniques which they deem best suited for determining fitness for the particular supervisory position. Under the Education Law, the Board of Examiners not only must determine whether a candidate's record satisfies the Chancellor's minimum education and experience requirements,** but it must ad-

* Although the Revised Plan also permits the Examiners to require candidates to write a single written essay "about matters relating to the position for which application is made" (I-585a), *no* candidate may be deemed unqualified by the Examiners, and thus denied provisional licensure, if the education and experience requirements are satisfied, even if a particular candidate appears to be totally unfit. Moreover, under the Revised Plan, the most the Examiners may do is "evaluate and comment on the candidates' written communication skills" (I-585a). Thus, it would appear that if a candidate writes well, but demonstrates a total lack of understanding about the substantive aspects of the essay, the Examiners may not properly even be able to "comment" on that substantive response (I-677a).

** Under the Board of Examiners' By-Laws, Section 4(2)(a), and under the "General Regulations Governing Examinations", pars. 13-19 (III-6a, 22a-1), applicants for a supervisory position must "establish their eligibility" for the position by demonstrating compliance with the Chancellor's requirements.

minister an "objective examination" and conduct such other "investigation as may be necessary to ascertain the fitness of applicants", *Jurisdiction Case*, 25 State Department Reports at 280-281.* In the words of Examiner Ethel Fitzgerald, the Judgment appealed from prohibits

> ". . . the objective testing of applicants in those very areas demanded of supervisors in the New York City school system today—judgmental ability, speaking ability, ability in human relations, evaluative ability, as well as the substantive content areas required for the particular supervisory position—all of which would be examined under the [Permanent] Plan for plenary examinations which is presently part of the Consent Judgment. . . . That [Permanent] Plan sets forth a flexible system of examination procedures which all sides agreed as long ago as May 1974 was the basis for examinations which are job related, non-discriminatory and comply with New York law." (I-673-674a).

3. The Judgment eliminates the requirement that a candidate pass an "objective examination" before receiving a license. It is clear that provisional licensure under the Revised Plan occurs without the "examination" required by New York law. Moreover, even permanent licensure will occur without the candidate successfully completing the "examination" contemplated by New York law. As noted above, *Nyquist* held that a license may only be issued after a candidate passes an examination; and that a license may not be issued because the candidate complies with the Chancellor's education and experience require-

* Thus, the Education Law requires a candidate both to comply with the Chancellor's "education and experience requirements" *and* to pass an "objective examination" before being eligible for appointment to a supervisory position. The Revised Plan only requires that a candidate satisfy one requirement.

ments, and because of "satisfactory performance during temporary or 'out-of-title' service" in a position. 31 N.Y.2d at 472; 341 N.Y.S.2d at 445.

4. Even assuming *arguendo* that a review of a candidate's resume is an "examination" (and it is not), it is certainly not an "objective examination" as required by Section 2590-j(3)(a)(1) of the Education Law and *Fink* v. *Finegan*, 270 N.Y. 356, 361-362, 1 N.E.2d 462, 464 (1936) (New York's Constitution reqrires "an objective standard or measure"). As was indicated in the affidavit of Ethel Fitzgerald submitted to the court below:

> "Instead of measuring an applicant's fitness, it [the Revised Plan] will measure his ability to prepare the best possible resume or application—or perhaps to have someone else do so for him. Instead of an impartial examination, it will also afford a wide opportunity for inequities and subjective decisions." (I-676a)

5. Since the Chancellor sets the education and experience requirements, he, in effect, will "prepare" the "examination" and set the "passing grade", both of which are functions within the Examiners' exclusive province.

6. Under the Revised Plan, the Examiners' sole function will be "review, verification and analysis of record" (I-584a)—a clerical function which certainly does not permit a determination of "merit and fitness" in accordance with the commands of New York law.

b. The Judgment runs afoul of important considerations of federalism

By depriving the Board of Examiners of their statutorily-mandated control over determinations of merit and fitness and over the examination process, and otherwise altering New York's constitutional and statutory scheme, the Judgment runs counter to the well developed principle, most recently enunciated by the Supreme Court in *Rizzo* v. *Goode*, —— U.S. ——, 46 L. Ed.2d 561, 573 (1976), that

> ". . . federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' Stefanelli v. Minard, 342 U.S. 117, 120. . . ."*

In *Rizzo*, the Supreme Court reversed the entry of an injunctive order which "indisputably" constituted a "sharp limitation" on a municipal police department's "latitude in the dispatch of its own affairs" because of the underlying

> ". . . principles of federalism which play such an important part in governing the relationship between federal courts and state governments. . . ." —— U.S. ——, 46 L. Ed.2d at 574-575.

The principle that federalism places limits upon the injunctive power of federal courts is particularly applicable here, as it was in *Rizzo*, since the Judgment entered below makes fundamental changes in New York's constitutional and statutory law *without any legal basis*. There was absolutely no showing below that the entry of that

---

* *See also Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974); *Carter* v. *Jury Comm'n*, 396 U.S. 320, 338 (1970).

Judgment was necessary to achieve any countervailing federal goal or protect any federally recognized right. In fact, plaintiffs and defendants jointly developed the Permanent P' n and' submitted it to the district court as an agreed upon, constitutional selection system. Plaintiffs' counsel specifically conceded during those submission proceedings in the district court that the Permanent Plan was the basis for constitutional, non-discriminatory, job-related examinations (I-348-349a, 459a-10-460a). Thereafter, on the return date of the motion to "modify", plaintiffs' counsel again conceded that the Permanent Plan provided for a constitutional program of selection and licensing.*

In short, *Rizzo* makes clear that a federal court's power to grant injunctive relief altering or suspending state law is limited by the need to remedy constitutional wrongs. Since at the time of the "modification" motion below no such need was before the district court, that court lacked the power to act as it did and, accordingly, for that reason alone, the Judgment entered below should be reversed.

3. The "modification" eliminates the universally accepted requirement that a job analysis be prepared as a prerequisite to valid employment testing procedures

The Judgment below eliminates the requirement that future selection procedures be based upon job analyses. Thus, while an integral part of the Permanent Plan to which all of the parties agreed was a provision for the

---

* Thus, plaintiffs' counsel stated:

> "Any of these things [i.e., both the Permanent Plan and the Revised Plan] is constitutional. We don't doubt the constitutionality. The only problem is the efficiency." (I-907-908a).

preparation of job analyses (I-515-519a), the Revised Plan adopted by the court below in its stead eliminates those provisions. Yet, the United States Supreme Court and this Court, as well as the Equal Employment Opportunity Commission and the Equal Employment Opportunity Coordinating Council, have all specified the necessity and importance of job analyses in creating job-related examinations and selection procedures.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the Supreme Court indicated that a job analysis must be prepared in order to establish the content validity of an examination. *Id.* at 429-435. And, in finding that the defendant had not established the validity of its examinations, the Court quoted the Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures", 29 C.F.R. Part 1607, which provide in part:

> "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. . . . Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 C.F.R. §1607.5(b)(3), quoted at 422 U.S. at 432 n.30.

In addition, the preliminary injunction decisions in this case plainly indicated that a job analysis must be prepared. *See* 458 F.2d 1167, 1174 (2nd Cir. 1972), *aff'g*, 330 F. Supp. 203, 216 (S.D.N.Y. 1971). In support of their preliminary injunction motion in 1971, plaintiffs' testing expert had successfully argued that a proper job analysis was "necessary" to establish the validity of an examination and in seeking affirmance in this Court plaintiffs argued that the performance of a job analysis is "the first and essential

step in developing a job-related examination" (I-681-682a). Although plaintiffs continued to state the same view on the proceedings below,* they vigorously supported the motion to "modify" which successfully sought to eliminate the requirement that a job analysis precede the preparation of future supervisory examinations.**

Other decisions of this Court have also held that job analyses must be prepared in order to establish content validity and job-relatedness. *See Jones* v. *New York City Human Resources Administration*, 528 F.2d 696 (2nd Cir. 1967), *petition for cert. filed*, 44 U.S.L.W. 3686 (U.S. May 22, 1976) (No. 75-1694); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 425-426 (2nd Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3675 (U.S. May 7, 1976) (No. 75-1631); *Vulcan Society* v. *Civil Service Comm.*, 490 F.2d 387, 393-397 (2nd Cir. 1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm.*, 482 F.2d 1333, 1337-1338 (2nd Cir. 1972). For example, in *Vulcan*, this Court held that "the absence of a proper job analysis is of great weight in evaluating the job-relatedness of a qualifying examination", 490 F.2d at 394 n.8, and in affirming the district court in *Jones*, 528 F.2d at 699, this Court cited with approval Judge Lasker's opinion below, which provided in part:

> "The initial step in the construction of a content-valid evaluation is the 'job analysis.' . . . Obviously, the adequacy of the job analysis is crucial to a content-

* Plaintiffs urged below that "valid job analyses are the essential underpinning of job-related examinations" (I-654a).

** Plaintiffs have not changed their views. Since no examination is required under the Revised Plan, plaintiffs have obviously concluded that a job analysis would be superfluous.

valid examination; unless the analysis accurately describes the 'content' of the job, the content of the examination based on it is likely to be seriously distorted." 391 F. Supp. 1064, 1077 (S.D.N.Y. 1975).

In addition to case law, recent agency statements have stressed that preparation of job analyses is essential. The Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures", 29 C.F.R. Part 1607 (1975), provide that job analyses must be prepared in order to establish content validity (I-681a, 683a). Moreover, the Equal Employment Opportunity Coordinating Council's proposed "Uniform Guidelines on Employee Selection Procedures", 41 Fed. Reg. 29016, 29019-29020 (1976), emphatically declare that job analyses are essential to establish content or construct validity.

It is thus clear that the elimination of the requirement of job analyses by the district court contravenes accepted principles for valid selection procedures. The result will either be selection procedures which are not job-related *or*, even if that is not so, the Examiners will face a difficult burden in establishing job-relatedness in the future, having been required to start in the wrong direction. In either case, the district court erred and, accordingly, its Judgment should be reversed.

4. The effect of the "modification" is to undermine the utility of consent dispositions of protracted litigations and the notion of finality

By granting the "modification" motion below, the district court gave the Board of Education and plaintiffs all of the benefits which they bargained for in agreeing to the

settlement of this case and to the Permanent Plan, but deprived the Examiners of their *quid pro quo*, the implementation of a comprehensive system of plenary examinations which meet the requirements of New York State law. Such a result was not only inequitable but undermined the utility of consent judgments in settling major litigations and the notion of finality.

In 1973 plaintiffs and defendants Board of Examiners and Chancellor agreed to a two part settlement of this case which resulted in the entry of the Consent Judgment (I-617-618a, 621-624a).*

The first part of the settlement called for the implementation of an agreed-upon so-called "interim" selection and licensing system using on-the-job performance evaluations so that supervisors appointed on an "acting" basis during the pendency of this case expeditiously could obtain licenses. The plaintiffs benefited from this part of the settlement because over 1,100 supervisors, many of them members of plaintiffs' class, have been licensed pursuant to that "interim" system without passing the plenary examination contemplated by New York law (I-696a).

The second part of the settlement called for the subsequent development by the parties of the Permanent Plan for a comprehensive system of plenary examinations. It was expressly agreed that when the Permanent Plan was developed, it would replace the "interim" system (I-128a, 132a, 134-136a, 138a, 254a, 256-259a).

* Although defendant Board of Education initially resisted that settlement, in early 1975 it also consented to be bound by the Consent Judgment.

However, despite the agreement of all parties to the Permanent Plan, the submission of that Plan to Judge Tyler in May 1974, Judge Tyler's approval of it in January 1975 and its formal incorporation as part of the Consent Judgment in March 1975, Judge Pollack granted the far-reaching "modification" motion at the behest of the Board of Education, the Chancellor and plaintiffs. As a result, a double catastrophe has occurred. Not only does the Judgment eliminate the testing procedures laboriously developed by the parties, but it preserves all of the concessions which the Examiners made in order to reach agreement on the Permanent Plan. These concessions went far beyond anything required by law.

Needless to say, the Board of Examiners would never have agreed to the "interim" on-the-job evaluation system or, in fact, to concessions in the Permanent Plan which have been carried over into the Revised Plan if it ever considered that such a result was remotely possible.*

It has been consistently recognized that since consent decrees are judicially approved agreements between the parties, courts should exercise extreme caution in changing their terms—whether by a "modification" or an "interpretation"—and should be especially vigilant to prevent a party to such a decree from seeking to escape from it after receiving benefits under it. *See e.g., United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971); *Airvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283 (2nd Cir. 1962) ("A

* In addition, lest there be any doubt about it, the Examiners would never have agreed to anything like the Revised Plan. In fact, in early 1973, the Board of Examiners rejected a settlement proposal made by plaintiffs which was substantially similar to the "modification" granted below (i-708-709a).

consent decree represents an agreement by the parties which the court cannot expand or contract"); *United States* v. *Lucky Lager Brewing Company*, 209 F. Supp. 665, 668 (D. Utah 1962); *United States* v. *Swift & Co.*, 189 F. Supp. 885, 907 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (*per curiam*) ("*Swift II*"); *United States* v. *Shubert*, 163 F. Supp. 123 (S.D.N.Y. 1958) (Kaufman, J.). *Cf. Robinson* v. *E. P. Dutton & Co.*, 45 F.R.D. 360 (S.D.N.Y. 1968).

Thus, in denying a motion to modify, the court in *Swift II* held:

> "If a composition reached after full and deliberate consideration may be set for nought simply because one of the parties on second thought believes he would have fared better at a trial, the decree becomes nothing more than a continuance or postponement of the trial, and the mutual benefits which induce this form of disposition will be lost.
>
> In the conferences that led to the decree, the defendants were not untutored innocents at the mercy of an overweening government. The evidence of compromise in the decree suggests their power to bargain. They gained significant advantages through their consent. They were spared the expense, burdens, and publicity of a full trial, and avoided the risk of more drastic relief. . . ." (189 F. Supp. at 907.)*

* Likewise, in denying the motion to modify in *Shubert*, the court held that to liberally grant modifications "would deprive the consent judgment or decree of much of its vitality inasmuch as it would amount to an open invitation" to parties "who have made concessions in order to reap the benefits" of a settlement "to repudiate them" (163 F. Supp. at 124); and in denying a motion to set aside a discontinuance resulting from a settlement, the court in *Robinson* held that a party will not be permitted to "make a mockery of the doctrine of finality" by settling the case and then attempting to reopen it to obtain "an additional term." (45 F.R.D. at 362.)

Surely, if the Judgment in this case is permitted to stand, the utility of consent decrees as devices to resolve protracted litigation will have been severely undermined.*

5. The Board of Education should have been barred from obtaining the "modification" by its inconsistent position in this case in 1973 and 1974

The parties herein agreed to a two part settlement of this case. In 1973 and 1974 the Board of Education vigorously opposed the first part of that settlement. Over its opposition (I-203-204a, 238-242a, 628-629a, 703a), the district court entered a Consent Judgment with respect to the Board of Examiners and the Chancellor in accordance with the Stipulation of Settlement, and entered a parallel order with respect to the Board of Education, both of which adopted an "interim" system of selection and licensing of supervisors using certification of compliance with education and experience requirements and on-the-job performance evaluations (I-251-267a).

In opposing that part of the settlement, the Board of Education contended, first in the district court and then on appeal in this Court, that licensing of supervisors solely on the basis of the certification of educational and experience attainment and an on-the-job performance evaluation

---

* In addition, both the Board of Education and plaintiffs should have been barred under the doctrine of equitable estoppel from the relief granted below. The Examiners were clearly misled to their detriment by the conduct of both the Board of Education and plaintiffs. *See Pickerson* v. *Colgrove*, 100 U.S. 578 (1879); *Lignos* v. *United States*, 439 F.2d 1365, 1367-1368 (2nd Cir. 1971); *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92, 95-103 (9th Cir. 1970); *Rode & Brand* v. *Kamm Games*, 181 F.2d 584, 587-588 (2nd Cir. 1950); *Delson* v. *Minogue*, 190 F. Supp. 935, 937-938 (E.D.N.Y. 1961).

violated New York State's Constitution and its Education Law. In fact, the Board of Education argued in Point I of its brief in this Court:

> "It was improper to direct that permanent appointments be made without compliance with the requirements of the State's constitutional and statutory requirements of merit and fitness determined by competitive examination. Such a direction would be improper even in a final judgment since the alleged discrimination could be cured by requiring proper methods of testing without any need for disturbing the State's constitutional and statutory requirements." (Brief of Appellant Board of Education dated November 13, 1973, Appeal No. 73-2320, p. 19).

Moreover, the Board of Education's brief quoted the terms of Education Law §2590-j(3)(a)(1) which provides that the Board of Examiners "shall prepare and administer objective examination to determine the merit and fitness of all candidates for . . . supervisory service positions . . ." and correctly concluded that to obtain a permanent appointment to a supervisory position under New York law an applicant must ". . . pass an objective examination given by the New York City Board of Examiners". (Board of Education's Brief, pp. 26, 27.)

Yet, on its motion to "modify", the Board of Education took the opposite position on the same issue. It sought judicial approval of a scheme whereby it, rather than the Board of Examiners, would determine the nature and content of supervisory examinations and which consisted of on-the-job performance evaluations together with certification

of compliance with education and experience requirements.*

It has been consistently recognized that, because of regard for the dignity of the judicial process, a party will be barred from assuming inconsistent positions on the same issue in the same case. This principle is known as the doctrine of judicial estoppel or preclusion against inconsistent positions. *See e.g., In re Johnson,* 518 F.2d 246, 251-253 (10th Cir.), *cert. denied,* 423 U.S. 823 (1975); *Texas Co.* v. *Gulf Refining Co.,* 26 F.2d 394 (5th Cir.), *cert. denied,* 278 U.S. 625 (1928); *Duplan Corp.* v. *Deering Milliken, Inc.,* 397 F. Supp. 1146, 1177-1184 (D.S.C. 1974). Thus, in *Johnson,* the Tenth Circuit held:

> "Under the doctrine of judicial estoppel a party and his privies who have knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party. This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions." (518 F.2d at 252).

Similarly, in *Duplan,* the Court held:

> "That an estoppel can arise because of a prior inconsistent claim or position taken in a judicial proceeding is clear. A party cannot have its cake and eat it too. Although there are several species of estoppel, the court is here dealing with what is generally known as judicial estoppel or the doctrine of preclusion

* In fact, the Board of Education's motion sought approval of a proposal for selection and licensing which would have required much less of an "examination" than that to which it objected in 1973 and 1974 (1-581-613a).

against inconsistent positions. This type of estoppel protects interests different from those protected by equitable estoppel. . . . Equitable estoppel is designed to protect any adversary who may be prejudiced by the attempted change of position. On the other hand, judicial estoppel, or preclusion against inconsistent positions, is designed to protect the integrity of the courts and the judicial process." (397 F. Supp. at 1177.)

These cases teach that the Board of Education's prior inconsistent position should have barred it from obtaining the "modification" granted by the court below. The Board of Education cannot be permitted to play fast and loose with the courts in an attempt to obtain what, at a particular moment, it deems to be to its advantage.

6. The Board of Education and Chancellor should have been barred from obtaining the "modification" by their failure and refusal to carry out in good faith their obligations under the Permanent Plan

The Board of Education and Chancellor moved to "modify" in order to discard the Permanent Plan. Yet, over a substantial period of time, they had failed and refused to carry out in good faith even their initial responsibilities under that Permanent Plan (I-615-646a, 781-787a).

Under such circumstances, they should have been barred from obtaining the "modification" of the Consent Judgment granted below. The doctrine of unclean hands ". . . closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. . . ." *Precision Instrument Mfg. Co.* v. *Automotive Co.*, 324 U.S. 806, 814 (1945). *See United States*

v. *Georgia-Pacific Co.*, 421 F.2d 92, 103-104 (9th Cir. 1970); *International Alliance* v. *Rex Theatre Corp.*, 73 F.2d 92, 93 (7th Cir. 1934). It should have closed the doors of the district court to the "modification" motion.

B. The motion to implement was erroneously denied

We have demonstrated above that for numerous separate reasons the motion to "modify" the Consent Judgment and the March 25, 1975 Order should have been denied in all respects. Conversely, the Board of Examiners' motion to implement those decrees should have been granted by the court below.

Under the Permanent Plan the Board of Education was required to adopt three prototype job analyses prepared by AIR, its consultant, and AIR had turned the analyses over to it in "the Spring of 1975" (I-518-519a, 782a). Yet, at the time of the proceedings before the court below, the Board of Education had still not adopted and delivered those analyses to the Examiners. Of course, until the Board did so, the Examiners could not, utilizing its consultant, commence preparation of the new plenary examinations contemplated by the Consent Judgment and the New York Education Law, and long awaited by Judge Mansfield, Judge Tyler, this Court and the New York State Court of Appeals.*

* *See* Judge Mansfield's decision rendered May 21, 1973 preliminarily approving the Stipulation of Settlement (I-200-208a) and his decision rendered July 10, 1973 finally approving the settlement (I-244-249a); Judge Tyler's decision rendered April 1, 1975 accompanying the March 25, 1975 Order (I-540-543a); this Court's 1974 decision upholding the "interim" selection and licensing system adopted as part one of the settlement, 496 F.2d at 825; and the New York Court of Appeals' decision in *Board of Education* v. *Nyquist*, 31 N.Y.2d 468, 474-475, 341 N.Y.S.2d 441, 446-447 (1973).

Under the circumstances, the district court should have required the Board of Education to comply with the terms of the Permanent Plan. The Examiners' motion to implement sought an order authorizing and directing the Board of Examiners, utilizing its consultant, to prepare and adopt, at the expense of the Board of Education, the three prototype job analyses (I-615-617a). Such relief would have been reasonable, and it was warranted and necessary to carry out the terms of the prior decrees in this case.

It is clearly established that where a party is required by a decree to perform an act, and fails to do it, the courts will enter an order requiring that the act be done by a date certain. *See e.g., Gautreaux* v. *Chicago Housing Authority,* 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971); *Wagner* v. *Warnasch,* 156 Tex. 334, 295 S.W.2d 890 (1956) (consent decree). Thus, in *Gautreaux,* the decree ordered defendant to use its "best efforts" to build public housing in predominantly white areas and the Seventh Circuit affirmed the entry of an order imposing deadlines for defendant to take the first step in the site selection process where one year had passed without that step being taken on any sites. Similarly, in *Wagner,* a consent decree granted plaintiffs a right of way easement but required them to construct cattle guards. After plaintiffs failed to do so, the trial court ordered them to construct the guards within sixty days, and the Texas Supreme Court, in refusing to disturb that order, held that "in effect" the order "merely imposes upon the Warnasches [plaintiffs] the same obligations which were imposed by the consent judgment" (295 S.W.2d at 892).

In essence, the district court [illegible] previously imposed a deadline for the Board of Educa[illegible] compliance and the Board had failed to meet it. Thus, at the conference held on January 22, 1976 with respect to the motion to implement, Judge Pollack gave the Board of Education an additional six weeks to carry out its responsibilities under the Judgment with respect to the prototype job analyses (I-638-639a). The Board of Education failed and refused to comply with that deadline.

Accordingly, the district court should have granted the Examiners' motion to implement. Entry of such an order was clearly authorized by Rule 70 of the Federal Rules of Civil Procedure which provides in part:

> "If a judgment directs a party . . . to perform any . . . specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court. . . ."

Here, the district court's decrees required the Board of Education to perform a "specific act". It did not do so and the court below set a deadline for its compliance, which was also not complied with. Under Rule 70, the Board of Examiners, a public agency having expertise in the testing area, should have been authorized to create the analyses utilizing its independent consultant, Development Dimensions, Inc., experienced and recognized testing experts (I-781-787a).

Conclusion

It is respectfully submitted that the Judgment entered below on July 7, 1976 should be reversed. For the reasons set forth in Point I above, this cause should be remanded with instructions to vacate the Consent Judgment and dismiss this case in its entirety. In the alternative, for the reasons set forth in Point II above, this cause should be remanded with instructions to deny the motion to "modify", and grant the motion to implement, the Consent Judgment and the March 25, 1975 Order.

Dated: New York, New York
September 30, 1976

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant-Appellant
Board of Examiners
425 Park Avenue
New York, New York 10022
(212) 759-8400

Of Counsel:
SAUL Z. COHEN
JULIUS BERMAN
HOWARD A. JACOBSON
BARRY P. SCHWARTZ

ADDENDA

Addendum A

New York's Constitutional and Statutory Scheme for the Selection and Licensing of Supervisory Personnel in the New York Schools

Article 5, Section 6 of the New York State Constitution requires:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive. . . ."

In accordance with that constitutional mandate, the New York State Education Law repeatedly spells out the requirements that such examinations must be "objective", that they must be "prepare[d] and administer[ed]" by the Board of Examiners, that determinations of fitness are within the exclusive province of the Examiners and that licensure must precede appointment. Thus, Section 2569 (1)(a) of the Education Law provides:

> "It shall be the duty of the board [of examiners] to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools . . ., and to prepare all necessary eligible lists. . . ."

Similarly, Section 2590-j of the Education Law provides:

> "3. (a)(1) The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for . . . supervisory service positions. . . .
>
> * * *

[b] (2) Examinations for all supervisory service positions shall be open qualifying.

(3) The board of examiners may establish an eligible list for any class of positions for which it finds inadequate numbers of qualified persons available for recruitment."

In addition, Section 2573(2) provides, in part:

> "The superintendent of schools shall require the board of examiners, in anticipation of the reasonable needs of the school system, to conduct examinations so that eligible lists may be ready for promulgation as soon as vacancies come into existence. Where vacancies already exist, and cannot be filled because eligible lists have been exhausted, the superintendent of schools shall require the board of examiners to hold examinations forthwith. . . ."

Finally, in addition to passing an objective examination, the Education Law requires a candidate for a supervisory position to satisfy minimum education and experience requirements promulgated by the Chancellor. Thus, Education Law §2590-j(2) provides:

> "The chancellor shall promulgate minimum education and experience requirements for all teaching and supervisory service positions which shall not be less than minimum state requirements for certification. . . ."

ADDENDUM B

February 10, 1926.

In the Matter	:
of the	:
Investigation of the Board of Examiners of the City of New York by the President of the Board of Education of such city as a Committee of One appointed by said Board.	:

MEMORANDUM AS TO INQUIRIES SUBMITTED BY A COMMITTEE OF THE BOARD OF EDUCATION RELATIVE TO THE BOARD OF EXAMINERS.

The Board of Education of the City of New York, by a resolution adopted May 16, 1923, designated the President of such Board of Education as a committee "to conduct an investigation of the Board of Examiners of the City of New York and the conduct and affairs of such Board of Examiners," and directed such Committee to report the result of its investigations to the Board for its consideration and action. An investigation was conducted by the President of the Board as such Committee, pursuant to such resolution, which continued during the year 1923 and was terminated on January 28, 1924. Upon the completion of the investigation President Ryan as a Committee of the Board examined the evidence taken upon the investigation, preparatory to submitting his report to the Board as directed by the resolution. In December 1924, the President submitted his report to the Board of Education, consisting of the testimony taken upon the investigation and his findings or recommendations as to the affairs of the Board of Examiners based upon such testimony.

The Board did not act upon the report or the recommendations made by its President, but on December 10, 1924, adopted a resolution to the effect that the report be referred to the President of the Board and the Superintendent of Schools as a Committee of the Board, and that the Committee be authorized and empowered to advise with the State Commissioner of Education in reference to the matters contained therein. On January 23, 1925, such Committee of the Board submitted to the Commissioner of Education all the testimony taken upon the investigation, together with the exhibits referred to therein and the conclusions and recommendations of the Committee.

The Committee, at the time of submitting such report and recommendations, presented to the Commissioner of Education thirteen so called typical questions pertaining to the power of the Board of Education and the Superintendent of Schools as to examinations conducted by the Board of Examiners for the licensing of teachers. In submitting such questions the Committee states:

> "In order that the Board of Education and the Superintendent of Schools and other boards and officers may be clear in respect of their powers to bring about efficiency and competency in the services rendered by the Board of Examiners and proper, harmonious relations between the said Board and other boards and officers of the school system, the following typical questions which are now engaging the attention of the educational authorities of this city are submitted to you for your advice."

These questions pertain to the powers and duties of the Board of Examiners, the control and supervision of teachers' examinations by the Board of Education and the Superintendent of Schools, and in some instances to policies and methods to be observed in the conduct of such examinations.

An examination of the questions submitted will indicate that many of them are controversial in nature. A determination of them might effect adversely rights and powers asserted or claimed by the Board of Examiners. The Board or its members have not been given an opportunity to present their views relative to the matters involved in a

sideration and determination of such questions. It would not be proper for the Commissioner of Education to pass upon these questions in such a manner as to preclude the Board or any of its members or officers from raising such questions upon an appeal to the Commissioner of Education, under the Education Law, from any official action of the Board of Education or the Superintendent of Schools if they conceived themselves aggrieved thereby. The Board of Education has through its duly authorized Committee requested the opinion of the Commissioner of Education as to the particular matters referred to in the questions submitted. Their request is entitled to consideration and it may be advisable and useful to express an opinion as to the force and effect and the application of the provisions of the statute relating to the Board of Examiners and the conduct of teachers' examinations by such Board, and the powers and duties of the Board of Education and the Superintendent of Schools as to the Board of Examiners and teachers' examinations. A reasonable interpretation of the statute and the application of the provisions thereof as so interpreted will dispose readily of many, if not all, of the questions presented.

The Board of Education, the Superintendent of Schools and the Board of Examiners are created by statute and their powers and duties are defined therein. The public schools of the City of New York are under the control and supervision of the Board of Education and the Superintendent of Schools of the city school district of New York, which itself is a part of the State system. As stated by the Commissioner of Education in the case of the Appeal of the Superintendent of Schools of the City of New York relative to the adoption of certain by-laws, decided January 5, 1920:

> "It may be assumed that when the Legislature created the Board of Education with broad general powers, and the office of Superintendent of Schools who was to be the chief executive officer of the board should exercise its power of management and control by duly declared enactments and directions and that the Superintendent should execute and administer in detail, in accordance therewith, all the affairs falling within the management and control of the board."

The Board of Examiners is a part of the local school system, created by statute for the purpose of performing the very important function of testing the qualifications of candidates for teaching positions and providing lists from which appointments to such positions are made. The statute provides that:

> "It shall be the duty of the board to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists. Eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. No eligible lists, except a principals' eligible list, shall remain in force for a longer period than three years. The board of examiners may employ temporary assistants at a compensation fixed by the board of education. It shall perform such other duties as the board of education may required."
> (Education Law, Section 871, as added by L. 1917, Ch. 786, and amended by L. 1920, Ch. 837.)

As stated in the opinion of the Commissioner of Education in the case of Matter of Jurisdiction of Board of Examiners of the City of New York, 25 St. Dept. Repts. 275:

> "It was the obvious purpose of this section to confer upon the board of examiners the power and duty of examining applicants for teachers' licenses. Such power may not be exercised nor may such duty be performed without giving to the

> board of examiners entire control over the examination of applicants, which includes the preparation of questions, the rating of answers and such other investigation as may be necessary to ascertain the fitness of applicants for licenses. As to these matters the power of the board of examiners may be exercised exclusive of control by the board of education and the superintendent ofschools. There may not be, by regulation of the board of education or by the exercise of supervisory power conferred upon the superintendent, any interference with the determination of the fitness of applicants who are required to be licensed as teachers. This determination must under the statute be made by the board of examiners through the examinations conducted by such board."

The preparation of eligible lists upon which the names of all candidates for teaching positions are required to be placed, and from which appointments to teaching positions are required to be made, is within the exclusive control of the Board of Examiners. The conduct of examinations for the determination as to fitness of candidates and the methods and procedure to be followed upon such examinations are within the control of the Board of Examiners. Neither the Board of Education nor the Superintendent of Schools may by any official action deprive the Board of Examiners of the powers conferred upon it by statute as to such examinations, or interfere with the duties imposed upon the board pertaining to the determination of the fitness of candidates for teaching positions or the preparation of eligible lists.

It is the intent of the statute that the Board of Examiners should possess and exercise an exclusive power in the making of the tests and examinations which are required for the purpose of determining the qualifications of teachers. It would be contrary to the express language and the evident spirit of the statute to permit any other administrative agency to assume any responsibility or exercise any control in respect to the determination of the fitness of candidates for teaching positions.

The question arose in the case of the Matter of the Jurisdiction of the Board of Examiners, above cited, as to the extent of the control of the board of education and the superintendent of schools over the board of examiners and the conduct of examinations by it. The Commissioner held in this case that:

> "The board of examiners of the city school district of New York is not an independent body. It exists as a part of the educational system of the district. The jurisdiction of the board of education and of the superintendent of schools extends over it as over every other board or bureau of the system, subject only to the exclusive power and duty conferred by statute in the conduct of examinations and the preparation of eligible lists."

Subject only to the exclusive powers and duties above referred to, the Board of Examiners and all of its officers and employees are subject to the same supervision and control as other departments and bureaus of the city school system. The Superintendent of Schools may enforce the provisions of the law relative to teachers' examinations and require that they be held and that eligible lists be prepared so that teachers may be appointed as required. As was stated in the case above referred to.

> "The board of education may create such positions as may be necessary to enable the board of examiners to perform the duties imposed upon it. The employees of the board are to be appointed in the same manner as other employees of the educational systemof the district and their compensation is to be fixed by the board of education. Such employees are subject to the supervisory control of the superintendent of schools, in the same manner as other employees of the system."

In speaking of Section 871 of the Education Law, which creates the Board of Examiners and imposes upon it the duty to hold teachers' examinations and place the names of applicants who are required to be licensed upon eligible lists the Commissioner said in this case:

> "Such section in its provisions for the examination of applicants for licenses and the preparation of eligible lists, does not provide, nor is it necessary that it should provide in order to carry into effect the purpose of the statute, for an independent and exclusively controlled bureau within the educational system of the city school district. The control over the board of examiners exercised through by-laws of the board of education or within the jurisdiction of the superintendent of schools must be such as to leave the board of examiners free and independent in the ascertainment of the fitness of applicants for licenses and in the preparation of eligible lists. Subject to this limitation, the power and jurisdiction of the board of education and of the superintendent of schools over the board of examiners is the same as that which applies to all other activities of the ecuational system of the city school district."

In summarizing the conclusions reached by the Commissioner as to the questions submitted to him for determination upon the appeal, he stated that:

> "1. The superintendent of schools, as the chief executive officer of the educational system of the city school district of New York, has no jurisdiction over the examinations of applicants for teaching positions requiring licenses, which examinations include the preparation of questions, the rating of answers and such other investigations as may be necessary to ascertain the fitness of such applicants for licenses. The superintendent of schools may recommend licenses from persons who have been found upon examination to be qualified to receive such licenses and have been placed by the board of examiners upon eligible lists. Except as to such examinations and the preparation of eligible lists, the board of education and the superintendent of schools have the same jurisdiction and control over the board of examiners and its employees as they possess and exercise over other boards and bureaus within the educational system of the city school district.
>
> "2. The board of education may not determine the subjects of examinations and the dates on which examinations are to be held, and subdivision 2 of section 11 of the by-laws of the board of education providing to this effect is invalid. The superintendent of schools in the exercise of his administrative functions should determine the dates of examinations.
>
> "3. The board of superintendents may determine the subjects generally of examinations, and the board of education should prescribe such subjects on the recommendation of such board of superintendents. The determination of the passing mark upon examinations enters directly into the determination of the fitness of applicants for licenses and should be made by the board of examiners, subject to review as provided by law."

The reasons upon which such conclusions are based are set forth at length and with some care in the decision on the appeal. The Board of Examiners instituted the appeal and presented a petition in which all the questions relating to the jurisdiction of the board of education and the superintendent of schools over examinations were presented properly for determination. The Board of Education appeared through

the Corporation Counsel of the city and answered the petition. A hearing was had and oral arguments were presented in behalf of the interested parties.

The questions presented upon this appeal must, therefore, be deemed to have been adjudicated and the determination thereof and the conclusions reached by the Commissioner of Education upon such appeal must be deemed effective and to control, so far as may be, similar questions presented to the Commissioner of Education for his consideration.

It follows, therefore, that the inquiries submitted by the Committee of the Board of Education, based upon the report of the President of the Board of Education as a Committee appointed to investigate the affairs of the Board of Examiners, must be considered and disposed of in the light of the provisions of the statute relating to the powers and duties of the Board of Education and Superintendent of Schools of the City School District of New York, and of the Board of Examiners of such district. It is my purpose to consider the inquiries in their order of presentation and to give my opinion as to each of them so far as they relate to the statutory powers and duties of the Board of Education, the Superintendent of Schools, and the Board of Examiners.

1. The Committee asks if the Superintendent of Schools has the power to direct the Board of Examiners to submit to him currently full information as to the matters relating to the work of the Board, including copies of the minutes of their meetings, monthly reports of examiners, copies of amendments to their rules, copies of questions upon written examinations, reports of results of examinations and copies of circulars of announcement of examinations.

Under Section 870, subdivision 1, of the Education Law, the superintendent of schools has the power

> "To enforce all provisions of law and all rules and regulations relating to the management of of the schools, etc."

He cannot enforce the law and the legally enacted rules relating to examinations without having information as to the work being done by the Board of Examiners. He may, therefore, require reports to be submitted to him as to the duties performed by the board. He may require the board to submit to him such information as he deems necessary, provided that he does not in any way interfere with the conduct of the examinations and the preparation of eligible lists. I do not think that he can require each examiner to state the amount and nature of the work done by him. This work pertains to the conduct of examinations and is not within his control. He may ask them to submit proposed rules and regulations and amendments thereof, although he may not in any way control such rules and regulations so far as they pertain to examinations and the ascertainment of the qualifications of candidates taking such examinations. He may request a report of the result of examinations, including the number of applicants, the number of successful candidates, the causes of failure, etc. While the superintendent may request, and the board should furnish, copies of circulars and other matters issued by the board, the superintendent may not control the nature and contents of such circulars so far as they pertain to the conduct of examinations.

2. In my opinion the Superintendent of Schools may not direct that all questions set up for examinations and the weights thereof shall be determined by the Board of Examiners at a meeting. The board itself has control over its procedure in determining what questions shall be asked and the weights that shall be given to such questions.

3. Examination papers must be in the custody of the Board of Examiners and under its control. Such board is responsible for such papers and the Superintendent of Schools may not interfere with or regulate the Board of Examiners in exercising its control over such papers.

4. The Superintendent may not direct the Board of Examiners to institute any system of correcting the papers. The matter of examining and correcting papers is within the exclusive control of the Board of Examiners.

5. The eradicating or minimizing of the so called coaching evil may be brought about by a regulation of the Board of Education to the effect that no teacher in the public school system shall be engaged in coaching candidates for teachers' licenses; or the Board of Examiners may provide that no teacher who has been engaged as a coach shall be employed by it. The matter of the employment of temporary assistants to aid the examiners is within the control of the Board of Examiners. The Superintendent may not deprive the Board of Examiners of its power to select such examiners.

It is provided in subdivision 9 of Section 868 of the Education Law that the board of education may "prescribe such regulations and by-laws as may be necessary to make effectual the provisions of this chapter." This gives to the Board of Education the power to make such regulations and by-laws as are necessary to make effectual the provisions of Section 871 of the Education Law, relative to teachers' examinations and eligible lists. It being established that the coaching of candidates by teachers or other persons who are employed as temporary examiners by the Board of Examiners is an evil, it would seem to be within the power of the Board of Education to adopt a by-law either prohibiting or limiting the employment of such coaches as examiners. This matter is evidently one which should be given careful attention by the Board of Examiners, the Board of Education and the Superintendent of Schools. If the Board of Education acts unwisely in its attempt to regulate the employment of coaches as examiners, the Board of Examiners may bring the matter to the attention of the Commissioner of Education by appeal, and a determination will be made upon the merits after giving all the parties an opportunity to be heard.

6 and 7. All rules and regulations relative to the conduct of examinations must be adopted by the Board of Examiners. They need not be submitted to the Superintendent of Schools for his approval prior to adoption. If no rules or regulations are adopted, as a result of which there is a failure upon the part of the board to perform the duties imposed upon it, the Superintendent of Schools may direct the board to adopt such rules. The form and substance of such rules, so far as they pertain to the examinations for licenses and the placing of such candidates upon eligible lists, are within the control of the Board of Examiners.

8. It is made the duty of the Board of Examiners to determine the fitness of candidates. The rules and regulations of the Board of Examiners must be applied uniformly. There may, however, be cases where a suspension or modification of the rules is necessary to do justice in particular cases. Such rules and regulations may, therefore, be suspended or modified in favor of a particular candidate if justice demands it and there be no unfair discrimination against other candidates.

9. This inquiry is as to the supervision and direction of the Superintendent of Schools over the members of the Board of Examiners as employees of the Board of Education. As held in the case of the Matter of the Jurisdiction of the Board of Examiners, 25 St. Dept. Repts. 275, 285, the control and supervision over the Board of Examiners by the Board of Education and the Superintendent of Schools must be such as to leave the Board of Examiners free and independent in the ascertainment of the fitness of applicants for licenses and the preparation of eligible lists; subject to this limitation, the power and jurisdiction of the Board of Education and the Superintendent of Schools over the Board of Examiners is the same as that which applies to all other activities of the educational system of the city school district.

It is further inquired as to whether the Superintendent of Schools is responsible for the supervision and direction of the work of the Board of Examiners and of the individual members of the board, to the same degree that he is responsible for the supervision and direction of all other employees of the Board of Education. The Superintendent of Schools may supervise and direct the Board of Examiners to the extent of requiring the conduct of the necessary examinations and the preparation of the lists of holders of licenses, as required by statute. He may not direct or supervise in any way the determination of the fitness of the candidates for licenses or the preparation of the eligible lists. The members, officers and employees of the Board of Examiners, being a

part of the educational system of the city, are subject to the same rules that are in force as to the office management of other bureaus and offices of the Education Department.

10. Inquiry is also made as to the power of the Board of Examiners to institute examinations of a particular nature to determine the qualifications of candidates for licenses, without consulting the Superintendent of Schools or without obtaining his approval therefor before the examination is held. It is provided in subdivision 2 of Section 878 of the Education Law that the Board of Education may create such teaching positions as may be necessary for the efficient management of the schools and of other educational activities. Having created such positions, it becomes the duty of the Board of Education of the City school district of New York, upon recommendation of the Board of Superintendents, to designate the kinds and grades of licenses which shall be required for teaching positions, "together with the academic and professional qualifications required for each kind or grade of license." This provision authorizes the Board of Education to determine, on the recommendation of the Board of Superintendents, the kinds and grades of licenses to be held, and also the academic and professional qualifications required of the holder of each license. The determination of the fitness of the candidates is within the control of the Board of Examiners. The Superintendent may not control the board in its application of the tests or the conduct of examinations for the purpose of ascertaining such fitness. The Board of Examiners is therefore not required to consult the Superintendent of Schools as to the nature of the examinations and tests to be applied.

11. This question also pertains to the nature of examinations to be held in determining the fitness of candidates for licenses. The inquiry is as to the power of the Board of Education to control the extent of written examinations required of graduates of training schools and the applicants for license No. 1. In my opinion the Board of Education or the Superintendent of Schools may not direct the Board of Examiners to eliminate or reduce the extent materially of the written examinations required of such graduates. This matter is one that must necessarily fall within the exclusive control of the Board of Examiners.

12. This question has to do with the rating of candidates for licenses. It being the duty of the Board of Examiners to examine all applicants who are required to be licensed or to have their names placed upon eligible lists. It is for the board to determine as to the relative values and weights of the various parts of the examinations and of the credit which shall be given on account of prior service and experience. All matters which relate to the rating of candidates for licenses fall within the exclusive control of the Board of Examiners. It is their exclusive duty to prepare eligible lists, and they could not perform this duty without determining in their own way and in accordance with methods adopted by them the ratings to be given to candidates upon examinations adopted by them.

It is possible that the methods used by the board in the conduct of its examinations are improper. It may be that the present practice does not produce desired results. The law does not permit either the Board of Education or the Superintendent of Schools to control the action of the Board of Examiners in the performance of its duty of conducting examinations and preparing eligible lists. The remedy, if any, would appear to be by an appeal to the Commissioner of Education from the action of the Board of Examiners as to a particular examination, raising the question of the sufficiency and propriety of such examination. Upon such an appeal the question of the fairness and the reasonableness of the methods used by the Board of Examiners might be determined after giving to all the interested parties an opportunity to be heard.

The question is as to whether the members of the Board of Examiners are "governed by the provisions of the Education Law and the by-laws of the Board of Education enacted in accordance therewith, as to their tenure of office, vacations, absences from duty, etc., and to what extent, if any, are they governed by the Civil Service Law and the regulations of the municipal Civil Service Commission." The examiners are appointed by the Board of Education. They are within the provisions of the Civil Service Law and appointments must be made from eligible lists prepared by the municipal Civil Service Commission, in accordance with the rules of the State Civil Service Commission.

There is no provision in the law as to tenure. They are expressly excepted from the provisions of Section 872 of the Education Law, relative to appointments for probationary periods. It is therefore doubtful whether an examiner who has served the period prescribed as the probationary period is entitled to permanent tenure under subdivision 3 of Section 872 of the Education Law. This is a question which ought not to be determined by me except upon appeal in a particular case, where all the parties interested may have an opportunity to be heard. It is my opinion that the examiners are subject to the rules of the Board of Education relative to vacations, leaves of absence and other similar matters. What we have already said as to the Board of Examiners being a part of the Education Department of the city applies to such matters.

It is obvious that the opinion which I have here rendered as to the several inquiries that have been presented to me may have a bearing upon controversies which may arise between the Board of Education, the Board of Examiners and the City Superintendent of Schools. My intent is to do nothing more than set forth general principles which should guide the Board of Education and the City Superintendent of Schools in the exercise of control or supervision over the conduct of examinations and the preparation of eligible lists by the Board of Examiners. If a controversy does arise in a particular case it will have to be determined upon appeal, after giving due notice to the interested parties and after a consideration of the particular facts and arguments presented by such parties.

Many of the questions pertain to methods and practice in the conduct of teachers' examinations. The investigation conducted by President Ryan, while in many particulars ineffective, is sufficient to show that defects exist in methods and practice upon such examinations which should be remedied. The Board of Examiners have complained bitterly of the nature of the investigation and the manner in which it was conducted. There is some basis for their complaint. It may at least be stated that there were instances where the members of the board were not given a fair and full opportunity to explain conditions which were criticized. It seems essential that further inquiry should be made of the members of the Board of Examiners and of others familiar with the examination system, before the recommendations of President Ryan, based upon investigation conducted by him be approved by me. I do not feel at liberty, with the evidence before me, to concur with him in his conclusions as to defects existing in the conduct of teachers' examinations.

The integrity of the teachers' examination system in the City School District of New York must be maintained. The public schools of the city will not accomplish the required results unless there be established and maintained a high standard of teacher qualifications. The effectiveness of the teaching service and the success of the public school system will depend upon the selection and promotion of members of the teaching and supervising staffs after the application of such tests as will determine fairly the merit and fitness of the candidates for teaching and supervising positions. If there are defects in the methods and devices used in the selection and promotion of teachers, nothing is more important than the elimination or correction of them.

The testimony presented upon the investigation conducted by President Ryan and the facts, recommendations and conclusions contained in his report may not be ignored. A careful consideration of them, together with such further information and statements as may be obtainable, might result in a modification of existing conditions and practice relative to the selection of teachers, with a consequent improvement of the teaching service. The Board of Regents, through its committees and the Commissioner of Education and his subordinates in the Department of Education, has already undertaken the task of examining the voluminous testimony and evidence which have been presented relative to the teacher examination system in the City of New York. It seems to be agreed that the defects which may be found to exist may be remedied, and that a modification of the present practice upon examinations for the purpose of obtaining better results may be made after due conference with city school authorities, the Board of Examiners and other interested in teachers' examinations. Recognizing the importance of the questions involved, the Board of Regents and the Commissioner of Education will be willing to give further consideration to these questions and advise the Board of

Education, the City Superintendent of Schools and the Board of Examiners, after due consultation with the interested parties, as to what action should be taken in respect thereto.

FRANK P. GRAVES, Commissioner of Education

FRANK H. GILBERT, Deputy Commissioner and Counsel.

Dated, Albany, N. Y., January 23, 1926.

9/30/76

Rec'd 2 copies

Legal Action

S. Lorn

Two

~~THREE~~ COPIES OF THE WITHIN PAPER
HAVE THIS DAY BEEN RECEIVED AT THE
OFFICE OF THE CORPORATION COUNSEL

~~Four~~ Two

Sept 30, 1976

CORPORATION COUNSEL

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5506)